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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~269.~~ 249

ISAAC S. HURT, PLAINTIFF IN ERROR,

vs.

D. M. HOLLINGSWORTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED OCTOBER 16, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 269.

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vs.

D. M. HOLLINGSWORTH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

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1 In the circuit court of the United States, eastern district of Texas, in the fifth circuit, holding sessions at Galveston.

ISAAC S. HURT
v.
D. M. HOLLINGSWORTH. } Law. No. 891.

Be it remembered that in the above entitled and numbered cause, begun in the district court of the State of Texas, in and for Galveston County, in said State, by petition filed in said State court by said Isaac S. Hurt against said D. M. Hollingsworth, on the 3d day of October, 1874, and removed from thence into the said circuit court, in accordance with the acts of Congress in that behalf, in which said cause a judgment final was made and entered in said circuit court, at the regular May term thereof, 1876, to wit, on the 6th day of June, 1876, the Hon. Amos Morrill, judge of the district court of the United States for the eastern district of Texas, presiding, said judgment being in favor of said defendant, D M. Hollingsworth, and against said plaintiff, Isaac S. Hurt, the following proceedings were had, to wit:

2 *Transcript from State court, Galveston County, filed May 3d, '75.—Petition filed Oct. 3d, 1874.*

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 7197. Petition filed Oct. 3rd, '74.

To the Hon. A. P. McCormick, judge of the district court for Galveston County, Texas:

Your petitioner, Isaac S. Hurt, who resides in the city and county of Galveston, Texas, complaining of D. M. Hollingsworth, of the city of New Orleans, State of Louisiana, respectfully showeth:

That petitioner is owner of lot No. 10, in block No. 90, in the city and county of Galveston, Texas, together with improvements thereon, and in possession thereof; that on, to wit, the 8th day of June, 1874, he purchased said premises from Anton Molsberger and Mary Molsberger, his wife; that the said Anton and Mary Molsberger, his wife, purchased said property on, to wit, the 19th day of December, 1865; that from and after said last-named date continuously down to the period of petitioner's purchase, said premises was the homestead of the said Anton and Mary Molsberger, owned, claimed, and possessed by them as such; that

3 the said Anton Molsberger was during all that time a citizen of this State, and the head of a family, owning and possessing said property as his homestead and that of his family; that said premises consist of a single city lot, and did not at the time of its destination as homestead by the said Molsberger and wife exceed in value two thousand dollars.

That on the 9th day of April, 1869, in cause No. 236 in the county court of Galveston County, the mercantile firm of R. Marsh, Denman & Co. recovered a judgment against the said Anton Molsberger on account of a debt contracted subsequent to the 10th November, 1866, & in the ordinary course of business; that afterwards, and while said premises was the homestead of the said Molsberger and family, for the purpose of harrassing the said Molsberger, the said plaintiffs in execution caused execution issuing out of said judgment to be levied on said lot No. 10, and caused the same to be sold under said execution on the 9th day of

October, 1873, the defendant herein, who is one of the members of the said firm of Marsh, Denman & Co., becoming the purchaser for the sum of $30.00 credited on the judgment; that in pursuance of such purchase the sheriff of Galveston County made a deed for said lot to defendant, who caused the same to be recorded in Galveston County.

4 And plaintiff says that said recovered deed is a cloud upon his title to said property; wherefore he prays citation to the defendant, by publication, that petitioner's title to said premises be quieted, and the cloud upon his title caused by the said recorded deed removed, for damages, costs, and general relief.

ROBT. G. STREET,
Plaintiff's Atty.

Before me, this 3rd day of October, 1874, came Robt. G. Street, plaintiff's attorney in above petition, and made oath that the defendant in said petition, D. M. Hollingsworth, is not a resident of this State.

ROBT. G. STREET.

Sworn to & subscribed before me this 3rd day of October, 1874.

DAVID WAKELEE,
Clerk District Court Galveston County,
Per J. P. HARRISON,
Dep. Clk.

Citation by publication.—Iss'd Oct. 3d, '74.

Citation by publication.

The State of Texas to the sheriff of Galveston County, greeting:

You are hereby commanded that you summon by publication D. M. Hollingsworth, who resides in the city of New Orleans, State of

5 Louisiana, to be and appear before the district court to be holden in and for the county of Galveston on the last Monday in November next, then and there to answer to the petition of Isaac S. Hurt, filed in said court against the said D. M. Hollingsworth, and alleging in substance as follows, to wit, that plaintiff is owner and in possession of lot No. 10, in block No. 90, in the city of Galveston; that he purchased the same on the 8th day of June last of Anton and Mary Molsberger, husband & wife; that at the time of said purchase and long before that time said premises was the homestead of said Molsberger & family; that while said lot was such homestead defendant caused an execution for an ordinary debt of the said Anton Molsberger to be levied thereon, and a sale to be made under the same, of which he became the purchaser, and to harass the said Molsberger the defendant recorded the deed of the sheriff of Galveston County in said county; that the record of said deed is a cloud on plaintiff's title. Prayer is made that said cloud be removed and title quieted in plaintiff.

Herein fail not, but have you then and there before said court

6 this writ with your return thereon, showing how you have executed the same.

Witness my hand and seal of office, at Galveston, this 3rd day of October, A. D. 1874.

DAVID WAKELEE,
Clerk District C. G. C.,
Per J. P. HARRISON,
Dept. Clk.

A true copy. I certify.

JOE ATKINS,
Sheriff G. C.

Sheriff's return on citation.

Received this writ October 4th, 1874, and executed the same on the 27th of November, 1874, by causing a true copy of this writ to be published in the Galveston News, a newspaper published in Galveston County, once a week for four successive weeks prior to return day.

JOE ATKINS,
Sheriff Galveston County,
By WM. F. SERFFERT,
Dept. Sheriff.

Appearance of deft. Hollingsworth.

In the district court of Galveston County, State of Texas, Feb. term, A. D. 1875.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 7197.

Now comes the defendant, D. M. Hollingsworth, and hereby enters his appearance in the above entitled and numbered cause at the same time that he files his petition for the removal of said cause into the circuit court of the United States for the eastern district of Texas,
7 at Galveston, at the next ensuing term of said circuit court of the United States in and for the eastern district of Texas, to be holden at the city of Galveston.

D. M. HOLLINGSWORTH,
By his att'ys, LABATT & NOBLE.

Petition of deft. Hollingsworth for removal.

In the district court of Galveston County.

I. S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 7197.

To the Hon. A. P. McCormick, judge of the district court of Galveston County:

The petition of D. M. Hollingsworth, who is a citizen of New Orleans, parish of Orleans, State of Louisiana, above-named defendant, respectfully shows:

That the above-entitled cause was instituted against him in the district court of Galveston County, State of Texas, on the 3rd day of October, A. D. 1874; that this defendant has not appeared in said action; that at the time said action was begun and filed and at the present time said plaintiff was and is a citizen of the State of Texas, and this defendant at the time said suit was begun & filed was and now is a citizen and resident of the city of New Orleans, State of Louisiana; that the
8 matter in dispute for which said suit is brought exceeds the sum of five hundred dollars, exclusive of all costs; and the said defendant, D. M. Hollingsworth, hereby offers F. R. Lubbock and C. W. Miles as sureties for his filing and entering in the circuit court of the United States for the eastern district of Texas, at Galveston, copies of all proceedings, process, pleadings, and papers filed in said cause against him,

October, 1873, the defendant herein, who is one of the members of the said firm of Marsh, Denman & Co., becoming the purchaser for the sum of $30.00 credited on the judgment; that in pursuance of such purchase the sheriff of Galveston County made a deed for said lot to defendant, who caused the same to be recorded in Galveston County.

4 And plaintiff says that said recovered deed is a cloud upon his title to said property; wherefore he prays citation to the defendant, by publication, that petitioner's title to said premises be quieted, and the cloud upon his title caused by the said recorded deed removed, for damages, costs, and general relief.

ROBT. G. STREET,
Plaintiff's Atty.

Before me, this 3rd day of October, 1874, came Robt. G. Street, plaintiff's attorney in above petition, and made oath that the defendant in said petition, D. M. Hollingsworth, is not a resident of this State.

ROBT. G. STREET.

Sworn to & subscribed before me this 3rd day of October, 1874.

DAVID WAKELEE,
Clerk District Court Galveston County,
Per J. P. HARRISON,
Dep. Clk.

Citation by publication.—Iss'd Oct. 3d, '74.

Citation by publication.

The State of Texas to the sheriff of Galveston County, greeting:

You are hereby commanded that you summon by publication D. M. Hollingsworth, who resides in the city of New Orleans, State of

5 Louisiana, to be and appear before the district court to be holden in and for the county of Galveston on the last Monday in November next, then and there to answer to the petition of Isaac S. Hurt, filed in said court against the said D. M. Hollingsworth, and alleging in substance as follows, to wit, that plaintiff is owner and in possession of lot No. 10, in block No. 90, in the city of Galveston; that he purchased the same on the 8th day of June last of Anton and Mary Molsberger, husband & wife; that at the time of said purchase and long before that time said premises was the homestead of said Molsberger & family; that while said lot was such homestead defendant caused an execution for an ordinary debt of the said Anton Molsberger to be levied thereon, and a sale to be made under the same, of which he became the purchaser, and to harass the said Molsberger the defendant recorded the deed of the sheriff of Galveston County in said county; that the record of said deed is a cloud on plaintiff's title. Prayer is made that said cloud be removed and title quieted in plaintiff.

Herein fail not, but have you then and there before said court

6 this writ with your return thereon, showing how you have executed the same.

Witness my hand and seal of office, at Galveston, this 3rd day of October, A. D. 1874.

DAVID WAKELEE,
Clerk District C. G. C.,
Per J. P. HARRISON,
Dept. Clk.

A true copy. I certify.

JOE ATKINS,
Sheriff G. C.

Sheriff's return on citation.

Received this writ October 4th, 1874, and executed the same on the 27th of November, 1874, by causing a true copy of this writ to be published in the Galveston News, a newspaper published in Galveston County, once a week for four successive weeks prior to return day.

JOE ATKINS,
Sheriff Galveston County,
By WM. F. SERFFERT,
Dept. Sheriff.

Appearance of deft. Hollingsworth.

In the district court of Galveston County, State of Texas, Feb. term, A. D. 1875.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 7197.

Now comes the defendant, D. M. Hollingsworth, and hereby enters his appearance in the above entitled and numbered cause at the same time that he files his petition for the removal of said cause into the circuit court of the United States for the eastern district of Texas,
7 at Galveston, at the next ensuing term of said circuit court of the United States in and for the eastern district of Texas, to be holden at the city of Galveston.

D. M. HOLLINGSWORTH,
By his att'ys, LABATT & NOBLE.

Petition of deft. Hollingsworth for removal.

In the district court of Galveston County.

I. S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 7197.

To the Hon. A. P. McCormick, judge of the district court of Galveston County:

The petition of D. M. Hollingsworth, who is a citizen of New Orleans, parish of Orleans, State of Louisiana, above-named defendant, respectfully shows:

That the above-entitled cause was instituted against him in the district court of Galveston County, State of Texas, on the 3rd day of October, A. D. 1874; that this defendant has not appeared in said action; that at the time said action was begun and filed and at the present time said plaintiff was and is a citizen of the State of Texas, and this defendant at the time said suit was begun & filed was and now is a citizen and resident of the city of New Orleans, State of Louisiana; that the
8 matter in dispute for which said suit is brought exceeds the sum of five hundred dollars, exclusive of all costs; and the said defendant, D. M. Hollingsworth, hereby offers F. R. Lubbock and C. W. Miles as sureties for his filing and entering in the circuit court of the United States for the eastern district of Texas, at Galveston, copies of all proceedings, process, pleadings, and papers filed in said cause against him,

and for his appearing in said circuit court of the United States and entering special bail if required by law, and for its complying in all and every respect with the provision of the judiciary act of the United States, 1789.

Wherefore this defendant prays this hon. court that said cause be removed into the said circuit court of the United States for said eastern district of Texas, and that this court proceed no further in the premises.

D. M. HOLLINGSWORTH,
By LABATT & NOBLE,
His Attorneys.

UNITED STATES OF AMERICA,
District of Louisiana:

Before me, a commissioner of the State of Texas in and for the State of Louisiana, duly commissioned & sworn, on this 15th day of
9 February, A. D. 1875, personally appeared D. M. Hollingsworth, to me known, who, being duly sworn, deposes and says that he is the defendant in the above cause and has read the foregoing petition signed by his attorneys, and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information & belief, and as to those matters he believes them to be true.

D. M. HOLLINGSWORTH.

Sworn to and subscribed before me, said commissioner, this the 15th February, A. D. 1875, as witness my hand & seal.

ANDREW HERO, JR.,
Commissioner.

Bond for removal.

STATE OF TEXAS,
County of Galveston:

Know all men by these presents that we, David M. Hollingsworth, of the State of Louisiana, as principal, and C. W. Miles & F. R. Lubbock, of the city and county of Galveston, State of Texas, as sureties, are jointly and severally held and bound unto Isaac S. Hurt in the penal sum of five hundred dollars, for which well and truly to be paid unto said Hurt, his heirs, executors, administrators, and assigns, firmly by these presents, sealed with our seals, using scrawls for seals,
10 this 15th day of February, 1875.

Whereas a suit is now pending in the district court of Galveston County, State of Texas, wherein Isaac S. Hurt is plaintiff and the said D. M. Hollingsworth is defendant, and numbered 7197 on the docket of said district court, and said defendant, D. M. Hollingsworth, has filed an application to remove said suit from said district court aforesaid into the circuit court of the United States for the eastern district of Texas, at Galveston:

Therefore, the condition of this obligation is such that if the said defendant, D. M. Hollingsworth, in said suit No. 7197, now pending in said district court of Galveston County, State of Texas, wherein said Isaac S. Hurt is plaintiff and said D. M. Hollingsworth defendant, shall on the 1st day of next term of the circuit court of the United States for the eastern district of Texas, at Galveston, and enter copies of all pleadings, proces'es, proceedings, and papers in said suit No. 7197 in said district court of Galveston County, and shall enter his appearance in said United States court, and enter special bail in the cause if such be

required, then this obligation to be null and void, otherwise to be
11 and remain in full force and effect.

[SEAL.] D. M. HOLLINGSWORTH.
C. W. MILES.
F. R. LUBBOCK.

STATE OF LOUISIANA,
City of New Orleans:

Be it known that on the fifteenth day of February, A. D. 1875, before me, Andrew Hero, a commissioner of the State of Texas in and for the State of Louisiana, duly commissioned & authorized to take the acknowledgment and proof of deeds and other instruments of writing, &c., to be used or recorded in said State of Texas, personally appeared the above-named D. M. Hollingsworth, to me well known to be the person who signed the above instrument of writing, bearing date the fifteenth day of February, 1875, and acknowledged that he had signed the same for the purpose & consideration therein expressed.

To certify to which I hereunto set my hand & official seal, at New Orleans, this 15th day of February, A. D. 1875.

[SEAL.] ANDREW HERO,
Commissioner.

Order for removal.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 7197.

MARCH 8TH, 1875.

12 One the pleadings and proceedings in this cause, and on the petition of D. M. Hollingsworth for the removal of this cause into the circuit court of the United States for the eastern district of Texas, at Galveston, he being a citizen of the State of Louisiana, and on the bond filed therein by the said defendant under the 12th section of the judiciary act of the United States of 1789, and on motion of said defendant's attorneys, to which no objection is interposed by plaintiff, it is hereby ordered and directed by the court that the security for the same for the sum of five hundred dollars offered by the said defendant be accepted and said bond approved, and that this court proceed no further in this cause, and the cause be removed into the said circuit court of the United States in and for the eastern district of Texas, at Galveston, and that the clerk of this court make certified copies of all proceedings in the cause for purposes of said removal.

Clerk's c'r't to transcript.

STATE OF TEXAS,
County of Galveston:

I, David Wakelee, clerk of the district court in and for the county of Galveston, do hereby certify that the foregoing is a true and cor-
13 rect copy of the petition, citation by publication, and petition for removal to circuit court of the United States, petition and affadavit, and the decree of removal, as the same appears of record and on file in this office.

Witness my signature, the seal of said district court, this 16th day of April, A. D. 1875.

[SEAL.] DAVID WAKELEE,
Clerk District Court G. C.

The foregoing indorsed as follows: Filed May 3rd, 1875. C. Dart, clerk.

Order. Appearance of def't.—From the minutes May term, May 3rd, 1875.

ISAAC S. HURT
vs. } 891.
D. M. HOLLINGSWORTH.

The defendant herein, on this the 1st day of this term of the court, here presents and files in this court a transcript of the record and proceedings in the above-entitled cause, commenced by the plaintiff herein, Isaac S. Hurt, against the defendant in the district court of Galveston County, State of Texas, removed by him from said State district court for trial in this court, in accordance with the laws of Congress in that behalf; and the defendant here enters his appearance in this
14 court in the cause by Labatt & Noble, his attorneys and counsel, and said cause is filed, entered, and placed on the circuit law docket of this court, to be proceeded in according to law.

Answer of defendant.—Filed March 6th, 1875.

In the circuit court of the United States, eastern district of Texas, at Galveston. May term, 1875.

ISAAC S. HURT
against }
D. M. HOLLINGSWORTH.

And now comes the said defendant, D. M. Hollingsworth, by his attorneys, and, in answer to plaintiff's petition, denies that plaintiff is or was the owner of lot No. 10, in block No. 90, in the city and county of Galveston, Texas, together with the improvements thereon, but alleges that this defendant is the owner of the same. He admits plaintiff is in possession of said real estate, but alleges that he is in the wrongful possession thereof and unjustly detains the possession thereof from this defendant, who is the legal owner thereof and entitled to the possession thereof since the seventh day of October, 1873, when he, the defendant, purchased the same and received a deed therefor.

Defendant admits that plaintiff obtained a deed to said prem-
15 ises from one Anton and Meri Molsberger, but defendant alleges that neither said Anton Molsberger or Meri Molsberger, or either of them, had any right, title, or interest in said premises which, at the time, they could legally convey to the said plaintiff or any one else after the 7th day of October, 1873, when defendant purchased said real estate, and that plaintiff' alleged purchase on the 8th day of June, A. D. 1874, was subsequent to that date.

Defendant admits that Anton Molsberger purchased said property on the 19th day of December, 1865, but denies that from and after said last named date, continuously down to the period of plaintiff's alleged purchase, said premises were the homestead of the said Anton or Meri

Molsberger, controlled, claimed, or possessed as such, but defendant avers the same were not occupied by said Anton or Meri Molsberger on the 7th day of October, 1873, and for a long time prior thereto; that they publicly declared it was not their homestead; that during that time they resided at the west end of Galveston Island.

And defendant alleges that on the 18th day of October, 1872, the said Anton Molsberger & Meri Molsberger, by deed, duly executed,
16 acknowledged, and recorded, granted, bargained, and sold to Royal T. Wheeler all their right, title, and interest of, in, and to said real estate, which said conveyance was duly recorded in the records of the county of Galveston, in Liber 7, pages 542, 543, which said conveyance was an abandonment of all homestead or homestead right in said real estate. All of which were well known to plaintiff before the plaintiff made the alleged purchase from Anton Molsberger and Meri Molsberger.

Defendant denies that during all the time alleged said Anton Molsberger as alleged either owned or occupied or possessed said property as his homestead and that of his family, but positively represented it was not his homestead.

Defendant denies that he caused execution upon said alleged judgment in favor of R. Marsh, Denman & Co. to be levied on said real estate while said premises were the homestead of the said Molsberger and family for the purpose of harassing the said Molsberger, but alleges that said execution was issued and levied upon said real estate only after said Anton Molsberger and his wife Meri Molsberger had granted,
17 bargained, and sold the said premises as hereinbefore alleged, whereby they abandoned their homestead or right of homestead in the premises, and only after said Molsberger had publicly declared the said premises were not his homestead.

That defendant admits he became the purchaser of said real estate at said sheriff's sale, and received from said sheriff a deed conveying to him, this defendant, all the right, title, and interest of the said Anton Molsberger in said premises and improvements, on the thirteenth day of October, A. D. 1873, whereby he became the legal owner of said real estate and improvements, and entitled to the possession of the same and the rents, issues, and profits thereof; and this defendant alleges that said sale was regularly and legally advertised by said sheriff, and that neither Anton Molsberger and Meri Molsberger, his wife, or any one in his or her or their behalf, objected to the said forced sale of said premises; all of which was well known to plaintiff before his pretended or alleged purchase as aforesaid.

And defendant, further answering, alleges that plaintiff well
18 knowing that he, the defendant, was the legal owner, has unjustly and unlawfully withheld from him the possession of said premises, and the rents, issues, & profits thereof. That the rents and profits of said real estate are of the value of seventy-five dollars per month for the use and occupation thereof. Defendant alleges that he is the owner of and entitled to the possession of said lot 10, block No. 90, in the city of Galveston, State of Texas, and to the rents and profits for the use and occupation of the same from and after the 13th day October, 1873.

Wherefore defendant prays that the title to said premises be declared to be in defendant, and that he have judgment for the restitution of said premises, and for the value of the rents & profits at seventy-five dollars per month from the 13th day of October, 1873, and for costs and for general relief, &c.

LABATT & NOBLE,
Att'ys for Deft.

The foregoing indorsed as follows: Filed May 6th, 1875. C. Dart, clerk.

19 *Agreement of counsel.—Filed January 21st,* 1876.

Agreement of counsel.

United States circuit court at Galveston.

HURT
vs.
HOLLINGSWORTH. } Law docket.

In this cause it is agreed that in the event no jury shall be in attendance on the court on the 25th day of January, 1876, then this case shall be considered as reset for 17th, 18th, or 19th of February next, as the court shall deem best. Filing of deeds and notice thereof is mutually waived.

ROBT. G. STREET & MILLS & TEVIS,
Pl'ff's Att'ys.
LABATT & NOBLE, *Att'ys for Deft.*

The foregoing indorsed as follows: "Filed Jan. 21st, 1876. C. Dart, clerk."

Order. Leave to defendant to amend.—From the minutes Dec'r term, 1875. *Feb'y 2nd,* 1876. *No.* 891.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH.

Upon application leave is given the defendant to amend.
This done Jan. 21st, '76, & entered nunc pro tunc.

20 *Amended answer.—Filed Feb'y* 14, 1876.

In the circuit of the United States, eastern district of Texas, at Galveston, December, A. D. 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH.

With leave of the court first had and obtained, defendant now comes, by his attorneys, and his answer heretofore filed, and says:

That the property in controversy in this suit, to wit, lot number ten (10) in block number *number* ninety (90), in the city and county of Galveston, State of Texas, together with the improvements thereon, is of the value of thirty-five hundred dollars, and that the rents arising from the same, at the rate of seventy-five dollars per month, which the plaintiff herein unjustly withholds from this defendants, are of the value of two thousand dollars, making a total value of the property, improvements, and rents in the sum of five thousand five hundred dollars. Defendant, further answering, notifies plaintiff to produce on the trial hereof the original deed of trust executed on the 18th day of October, 1872, by

Antone Molsberger and his wife to R. T. Wheeler, to secure the
21 payment of the note therein described, which said deed is recorded in book seven (7), pages 542 and 543 of records, in the office of the district clerk of Galveston County, State of Texas, otherwise defendant will offer in evidence a duly certified copy of the same; defendant prays for judgment as in his original answer, and for such other and further relief as he may be entitled to in the premises.

LABATT & NOBLE,
Att'ys for Def't.

The foregoing indorsed as follows: Filed February 14th, 1876. C. Dart, clerk, by Geo. C. Rives, dep'y.

Order, leave to plaintiff to amend.—From the minutes Dec'r term, 1875.—Feb. 16th, 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 891. C. L. 891.

Upon application leave is given the plaintiff to amend.

Amendment by compl't.—Filed Feb. 17th, 1876.

Amendment by complainant.

And now comes the complainant, leave to amend first being had and obtained, amend and say, that at the time he purchased the prop-
22 erty in controversy from said Molsberger & wife, who were the absolute owners of said property and were in the actual occupancy and enjoyment of the same as their homestead and that of their family, and that they had no other homestead at the time, and that they claimed the same openly and notoriously as such homestead, property, and home, all of which said defendants well knew; and the said property was their homestead, and claimed and used and enjoyed as such before, at, and after the time that said levy was made; all of which was well known to said defendant.

Complainant says that the property in controversy at the time this suit was filed, and is now, of the value of 5,500 dollars. He prays that said sheriff's deed be delivered up and cancelled, and that the record thereof on the public records is a cloud on his title and seriously embarrasses the same.

STREET & TEVIS,
For Comp'ts.

The foregoing indorsed as follows: Filed Feb. 17th, 1876. C. Dart, cl'k.

23 *Agreement waiving a jury.—Filed Feb'y 17th, 1876.*

United States circuit court.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 891. C. L.

Now comes the parties, plaintiffs and defendants, by their respective

attorneys, and waive a jury in this cause, and submit the matters therein as well of facts as of law to the court.

ROB'T G. STREET,
R. M. TEVIS,
Att'ys for Plff.
LABATT & NOBLE,
Att'ys for Def'ts.

The foregoing indorsed as follows: Filed Feb'y 17th, 1876. C. Dart, cl'k.

Order, cause heard and submitted.—From the minutes Dec'r term, 1875. *Feb. 16th*, 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 891.

This day came the parties to this suit, by their attorneys, and announcing ready for trial; and thereupon the said parties, by their respective attorneys, filed their agreement in writing signed by them, waiving a jury, and submitting the matters therein as well of facts as of law to the court; and the court having heard the pleadings
24 and the evidence, the questions at issue were submitted to the court for its consideration.

Judgment at special term.—From the minutes special term, March 13th, 1876.

In the circuit court of the United States for the eastern district of Texas.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } Law. No. 891.

This case came on for trial on the 17th day of February, 1876, the plaintiff appearing by his attorney and the defendant by his attorneys; and thereupon the said parties, by their respective attorneys, waived a jury by writing signed by them, and submitted the matters therein, as well of fact as of law, to the court; and the court having heard the pleadings and evidence and argument of counsel, and the court having taken time to consider, and being now fully advised, it is considered and adjudged by the court that the plaintiff take nothing by his suit, and the defendant having set up in his answer the ownership of the property in controversy in this suit, to wit, lot No. (10) ten in block No. (90) ninety, in the city and county of Galveston, State of Texas,
25 together with the improvements thereon, and having prayed a restitution of the same to him, the same being in the possession of the plaintiff, and having also claimed in reconvention rents for the use and occupation of the said premises from the 8th day of June, 1874, to the 8th day of March, 1876: wherefore, upon further consideration of the said pleadings and evidence and argument of counsel, it is ordered, adjudged and decreed, that the defendant, D. M. Hollingsworth, have and recover from the plaintiff, Isaac S. Hurt, the title and possession of said lot No. ten in block No. ninety, in the city and county of Galveston, State of Texas, together with the improvements thereon; and also

the sum of four hundred and twenty dollars as damages for the use and occupation of said premises by the said plaintiff; and that a writ or writs of possession issue to put the said defendant in possession of the said recovered premises.

It is further considered, that the defendant recover of the plaintiff all the costs about this suit incurred, and that execution issue therefor, as well as for the said damages.

26 *Motion for a rehearing & new trial.—Filed March 15th, 1876.*

Circuit court of the U. S., eastern district of Texas.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 891.

Now comes the plaintiff, Isaac Hurt, and applies to, moves, and prays the court to set aside the judgment which it rendered in this cause on the 13th instant, and to rehear said cause, and grant a new trial and hearing therein in accordance with the proper practice of the court.

And the said plaintiff alleges the following grounds in support of this application and motion:

1st. That the suit of the plaintiff was in the nature of a suit of equity and not of an action at law; and on the removal thereof into this court should have been proceeded with and heard as a suit in equity. But the same was not so proceeded with or heard, and the proceedings of the court in said cause in behalf of the defendant Hollingsworth have been irregular, improper, in violation of the practice of the court, and without jurisdiction.

2d. Because the answer, plea or reconvention of the defendant Hollingsworth was irregular and not within the jurisdiction of this court in this cause, and should not have been received or considered by the court.

27 3d. Because the said cause was decided by the court at a so-called special term thereof, begun on Monday, the 13th day of March, 1876, the regular and legal term of said court having expired prior to the first Monday (the 6th day) of March, 1876, the day for the term of said court at Brownsville. And the said term of said court is not a lawful special term, and was begun and held without authority of law; that the only pretended authority for said term is an order entered in the said circuit court of the United States on the 2d day of March instant, as follows, to wit:

"Ordered that a special term of the court be held on Monday, the 13th instant, for the transaction of such business as can and may be disposed of without a jury."

Which order was made and entered by the honorable district judge of this district. And said order was not made, nor was any order made to hold or authorize said special term by the presiding judge of the circuit court; whereas such special term can only be held by order of the presiding judge of the circuit court.

4. Because the said cause was tried and conducted as a case at common law, and such trial could not be had nor judgment therein rendered at a special term of said court.

5th. That plaintiff's is a suit in equity, and the defendant's plea, answer, or reconvention could only have had cognizance as an equitable cross-bill, and the decision whereby said defendant obtains a de-

28 cree for property worth over five thousand dollars, and sacrificed for only thirty dollars, under the claim and common understanding that the same was homestead, is wholly inequitable, unjust, and wrongful.

6th. That considering the said reconvention or suit of defendant as an action at law in this honorable court, the said answer of defendant in reconvention shows and alleges, and the proof was, that prior to the sheriff's deed, Oct. 3, '73, the said Malsburger and wife had conveyed the property sued for in trust, to wit, on the 18th day of October, 1872, and that whatever equitable right might have been acquired by said defendant Hollingsworth by said purchase on the 3d Oct., 1873, he did not acquire any legal right or title, such as alone would authorize the said defendant to sustain his reconvention or suit at law, and recover the title to and possession of the premises sued for in this court.

7th. That the judgment and decree rendered is against all the evidence in the case touching the alleged abandonment of the premises as a homestead by Maltsberger and wife, the evidence conclusively showing that they continued to use and claim the property in question as their homestead up to the time they conveyed to the plaintiff Hurt, and that they were occupying leased premises down Galveston Island, and that they had acquired no other homestead than the lot and
29 premises in suit up to their sale to said Hurt, all of which the def't knew at the time of his purchase.

8th. That the uncontradicted evidence of both Maltzberger and wife on the trial was that her former separate homestead was sold and, with twenty-one hundred dollars of the proceeds of her separate homestead, was invested in the purchase of the property in question, as and for her homestead and that of her family.

9th. That the judgment is contrary to the local law of the State as applied to homestead rights, in sustaining the sheriff's deed in question to the premises in suit, and that substantial has not been reached by the decree or judgment in consequence of the substantial irregularities in the pleadings, in the jurisdiction of the court, and in the mode and conduct and final disposition of the case.

W. P. BALLINGER &
ALBERT N. MILLS,
Atty's for Pl'ff.

Plaintiff, on oath, says that on a new trial or rehearing he will be able abundantly to prove that at the time of the sheriff's sale of the premises in question that it was a matter of public notoriety in the city of Galveston that said premises was claimed and used by Maltsberger & wife as their homestead property, and which was well known to defendant at the time of said sale, and for this no one would bid for the
30 property at said sale, and the same was at said sale knocked down to the defendant for the trifling sum of $30.00

That he will be able abundantly to prove that at the time of the sheriff's sale Maltsberger and his wife and family were down Galveston Island on a piece of land obtained from H. M. Trueheart, on which Maltsberger herded his horse and cow stock and to raise hay for his hack horses..

That during the time between his renting the island land and the execution sale, which was about one year and a half, Maltsberger rented out to tenants a part of the premises is suit, and expressly retaining one of the houses on said premises, together with the stable on the premises, for the personal use and benefit of his family, and that long

previous to his going to the island tract he had rented out from time to time the other tenements on the lot in question, save the one occupied by himself and children when in this city, which was often as to some of them.

That he had never acquired any new homestead until long after Maltsberger sold to this plaintiff.

That said Maltsberger and wife never had the least intention or idea of abandoning the premises in question, and they continued openly, publicly, and notoriously to claim the same, and announced and claimed the property in question as his homestead and that of his family, and used the same as such up to the time he sold the same to plaintiff.

That at the time of said sheriff's sale Maltsberger had subject to
31 forced sale five head of horses and between 25 and 30 head of cattle and about 40 head of hogs—all within the county of Galveston —which should have been sold under the execution before said real estate.

That on a new trial or rehearing plaintiff will be able abundantly to show that Maltsberger and family never abandoned said premises as a homestead until he sold the property to plaintiff in fee-simple with general warranty of title.

That he will abundantly show that the $1,500.00 purchase money mentioned in the deed from Dr. Henry Bennett to said Maltsberger, the purchase money for the premises in question, that said $1,500 was part of the proceeds of a former homestead of the family, which was the separate property of Mrs. Maltsberger, and that 600 dollars of her said separate property was expended by improvements on the premises, making the sum of 2,100 dollars which was the separate property of said Mrs. Maltsberger, the proceeds of her former homestead, which was her separate estate, and which was well known to def't at the time of his purchase.

I. S. HURT.

Sworn to and subscribed before me March 15th, 1876.

C. DART,
Clerk U. S. Circ't Court, E. D. T., G.

32 I know the contents of the above affidavit and statement; the facts therein stated are true.

ANTON MALSBERGER.

Sworn to and subscribed before me this 15th March, 1876.

C. DART,
Clerk U. S. Circ't Court, E. D. T., G.

The foregoing "motion" endorsed as follows, to wit: C. L. 891. Isaac S. Hurt vs. D. M. Hollingsworth. Motion for a new trial. Filed March 15, 1876. C. Dart, clerk.

33 *Order.—Judgment set aside.—From the minutes special term Mar. 16th, 1876.*

ISAAC S. HURT
vs. } No. 891.
D. M. HOLLINGSWORTH.

In this case the attorneys of plaintiff, Messers Ballinger and Mills, having filed with the clerk of the court a request that the judgment rendered on the 13th inst. be set aside, among others reasons, "Because

the said cause was decided by the court at a so called special term thereof, begun on Monday, the 13th day of March, 1876, the regular and legal term of said court having expired prior to the first Monday (the 6th day) of March, 1876, the day for the term of said court at Brownsville, and the said term of said court is not a lawful special term, and was begun and held without authority of law; that the only pretended authority for said term is an order entered in the said circuit court of the United States on the 2nd day of March instant, as follows, to wit:

"Ordered, That a special term of the court be held on Monday, the 13th instant, for the transacting of such business as can and may be disposed of without a jury."

Which order was made and entered by the honorable the district judge of this district, and said order was not made, nor was any
34 order made to hold or authorize said special term by the presiding judge of the circuit court; whereas such special term can only be held by order of the presiding judge of the circuit court.

Now, up consideration thereof, it is ordered that said judgment, and everything done at the special term of the court relative to said cause be set aside and the cause continued on the docket to be proceeded in at the next term of the court, in the same manner as if nothing therein had been done at this special term of the court.

Plaintiff's motion to take from the files certain papers of the defendant.—Filed March 23rd, 1876.

Circuit court of the United United, eastern district of Texas.

ISAAC S. HURT, PL'FT,
vs.
D. M. HOLLINGSWORTH, D'F'T. } No. 891. C. L.

And now comes the plaintiff in this cause by counsel and respectfully moves the court to take from the files in the above entitled and numbered cause all that part and portion of the answer of said defendant as purports to be a cross suit, reconvention suit, or action, or cross bill filed by said defendant on the 6th day of May, 1875, and amendments thereto in response to plaintiff bill of complaint, for the following reasons:

1st. Because the circuit court of the United States, sitting as a
35 circuit law court, has no jurisdiction to grant the defendant the relief prayed for in said cross suit, reconvention suit, or action, or cross bill.

2nd. That all that part of said answer purporting to be a cross suit, reconvention suit, or action, or in the nature of a cross bill, is a nullity, considering this cause as one of chancery jurisdiction, which it is, because, as a cross suit, reconvention suit, or in the nature of a cross bill in chancery, 1st. It, the original answer, was filed by plaintiff without leave of the court. 2nd. It made no defendant, and proceeded against no named defendant therein; 3rd. It prays for no process of the court to be issued against any one as a defendant, and no process was issued thereunder against any one as a defendant.

3rd. Because no decree or relief can be granted to the defendant, as a cause in chancery, by or under said answer, so far as the same is a cross suit, reconvention suit, cross bill, or in the nature of a cross bill, for the want of jurisdiction and power in said court.

The defendant in this cause, or his attorney of record, will please notice that this motion will be called up by the plaintiff for dis-
36 position by the court or judge at the April chancery rules A. D. 1876, or at such time thereafter as the same can be heard.

W. P. BALLINGER &
ALBERT N. MILLS,
Counsel and Att'ys for Pl'ft.

The foregoing endorsed as follows: Copy of within received Mar. 23rd, 1876. Labatt & Noble.

Filed March 23rd, 1876.

C. DART, *Clerk.*

Copy of within received March 23d, '76.

LABATT & NOBLE.

From rules.—Notice of foregoing motion.—From the rules Mar. 23d, 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } Law. No. 891.

This day came the plaintiff, by his attorneys, and files herein his motion to take from the files certain papers of the defendant filed by him in this suit.

Entered March 23rd, 1876.

Attest.

C. DART,
Clerk U. S. Circuit Court, E. D. T., G.

Motion of plaintiff to have the cause transferred from the law to the equity docket.—Filed March 23rd, 1876.

Circuit court of the United States, eastern district of Texas, at Galveston.

ISAAC S. HURT, PL'FT,
vs.
D. M. HOLLINGSWORTH, D'F'T. } No. 891. C. L.

And now comes the plaintiff in this cause, by counsel, and re-
37 spectfully moves the court to take this, the above entitled and numbered cause, from the common law side of the said circuit court docket and transfer the same to the chancery docket of said cir*court* court, to be there proceeded in agreeable to the rules and practice of said circuit court sitting in chancery, and this motion is made on the grounds:

1st. That the cause originally brought from the State court of Galveston County to this circuit court by the defendant herein was improvidently placed by said defendant on the law docket of the said circuit court of the United States.

2nd. That said circuit court of the United States sitting as a law court has no jurisdiction to try this cause as a law court, nor to grant the relief prayed for by the plaintiff herein, unless said cause is transferred to the chancery docket of the said circuit court to be proceeded in according to the rules and practise of said circuit court sitting in chancery.

The defendant in this cause, or his attorneys of record, will please take notice that this motion will be called up by plaintiff for disposition by the judge at the April rule day in chancery, A. D. 1876, or at such time thereafter as the same can be heard.

W. P. BALLINGER &
ALBERT N. MILLS,
Counsel & Attorneys for Plaintiff.

38 The foregoing endorsed as follows: Copy of within received March 23d, 1876. Labatt & Noble.

Filed March 23d, 1876.

C. DART, *Clerk.*

From Rules and Orders March 23d, 1876.

From rules. Notice of foregoing motion.

ISAAC S. HURT
v.
D. M. HOLLINGSWORTH. } Law. No. 891.

This day came the plaintiff, by his attorneys, and files herein his motion to transfer this cause to the chancery docket of the circuit court.

Attest: C. DART,
Clerk U. S. Circuit Court, E. D. T., G.

Entered March 23d, 1876.

Copy of notice, together with original petition of compl't, for leave to amend bill.—Filed April 3d, 1876.

ISAAC S. HURT, COMPL'T,
v.
D. M. HOLLINGSWORTH, DEF'T.

Cause pending in the circuit court of the United States, 5th circuit, for the eastern district, at Galveston.

Messrs. Labatt & Noble, counsel of record for the defendant in the above styled cause:

Please take notice that on the first Monday in the month of April, A. D. 1876, the same being rule day of said court, sitting in equity, or such time thereafter as the same can be heard, we will present complainant's petition to a judge of the above mentioned court—a true copy thereof in substance accompanies this notice—asking leave for said complainant to amend his original bill filed in this cause against the defendant, such amendments being set out in said petition in substance.

39 Galveston, March 30th, 1876.

W'M P. BALLINGER & ALBERT N. MILLS.
Counsel for Compl't, Isaac S. Hurt.

ISAAC S. HURT, COMPL'T,
vs.
D. M. HOLLINGSWORTH, D'F'T.

Cause pending in the circuit court of the United States for the eastern district of Texas, at Galveston.

To the hon. the judges of said court:

The petition of Isaac S. Hurt, compl't in this cause, respectfully asks

leave of the court or any judge thereof to amend his original bill of complaint, for the following causes and reasons here set forth:

1st. That he purchased the premises in question in good faith, being said lot No. 10 in block No. 90, and improvements on said lot, for a valuable consideration, on or about the 8th day of June, A. D. 1874, from said Anton Molsberger and his wife, Mari Molsberger, the same being the premises described in the original bill and amendment thereto.

That before and at the time of the money judgment against said Anton Molsberger, to which his said wife was no party, rendered in favor of said R. Marsh, Denman & Co., against Anton Molsberger, the d'f't herein
40 being a member of said firm, and that before and at the time of the levy of the execution rendered on said judgment in the county court of Galveston County and State of Texas, and at the time of the sale of said premises under said execution by Joseph Atkins, sheriff of said Galveston County, said lot No. 10 and improvements, in block No. 90, this complainant is now informed and verily believes and so charges to be true was the separate property & estate of Mrs. Mary Molsberger, the lawful wife of said Anton Molsberger, and that the said lot of ground and the improvements thereon, as hereinafter stated, were the separate property and estate of said Mrs. Mary Molsberger at the time of this complainant's purchase of said lot & all the improvements thereon from said Molsberger & wife.

Complainant further says that he is informed and verily believes and so charges to be true, that Mrs. Molsberger purchased said lot of ground from Henry Bennett, on or about the 19th day of December, A. D. 1865, for the sum of 1,500.00 dollars, and the conveyance was taken in the name of her husband without her knowledge or privity; and that the funds & monies which paid for said premises to said Bennett were the separate property and estate of said Mrs. Molsberger,
41 being in part of the proceeds of the sale of her former homestead, the same being her separate property, derived from her mother by gift, and the residue being funds & moneys received from her said mother by donation and gift; the total of the said proceeds of said Mrs. Molsberger's former homestead, together with the sums of money given her by her mother, her name being Mrs. , amounted to about the sum of 2,100 dollars, of which 1,500 dollars was paid to said Bennett and the balance expended for improvements on said lot No. 10, to make it suitable for her home & homestead and that of her family, which said former homestead of said Mrs. Molsberger was situated in the city of Galveston, and was sold by her and her husband, A. Molsberger, to one .

2nd. Complainant says he is informed and believes and so charges to be true, that the sale of said former homestead, the separate property of Mrs. Molsberger, was for the sole purpose of investing the proceeds in the lot in suit as her separate property and homestead, which was done, but in the manner above set forth.

He further says that the first time and day he heard of or re-
42 ceived the above information that the premises in question was the separate property and estate of said Mrs. Molsberger, before and at the time of the said levy and sale under said execution, was on the 17th day of Feb'y, 1876.

3rd. That said fact of the said premises being the separate property and estate of said Mrs. Molsberger was not known to complainant at the time of filing his original or amended pleadings, & complainant was not aware of the same in time to introduce said facts in the original bill,

but said matters and things are now brought forward to support and strengthen his bill.

4th. He further says that the matters and things set up in the proposed amendment to the bill which he asks the court or judge to allow are not set up and urged for the purpose of vexation or delay; and that the matters and things contained in said amendment are highly material to support & strengthen petitioner's case; and he further says that prior to this cause being filed in the State court, and since its removal into this court by defendant, plaintiff has made diligent search and inquiry for evidence and witnesses to sustain his case and title to said premises, and used all reasonable diligence to discover every and all neces-
43 sary matters to insert in his original pleadings; and that he could not with any reasonable diligence have introduced the matters of the proposed amendment into his original bill or amendment thereto.

And complainant now brings forward and urges said additional and newly discovered material matters and things to support and strengthen his bill and the prayers made therein, and in the amendment thereof.

Galveston, 30 March, 1876.

ISAAC S. HURT, *Complainant*,
By his counsel, WM. P. BALLINGER &
ALBERT N. MILLS.

THE STATE OF TEXAS,
Galveston County:

Before me, the undersigned authority, personally appeared Isaac S. Hurt, to me well known, who, being duly sworn, says that the matter and things as stated in the above foregoing petition are true to the best of his knowledge, information and belief, and that he is the petitioner therein mentioned.

I. S. HURT.

Sworn to and subscribed before me this 31st March, 1876.
[SEAL.] C. DART.
Clerk United States Circuit Court, E. D. T., G.

44 The foregoing indorsed as follows: Service of the within notice and copy of the within petition for leave to amend is hereby acknowledged. Labatt & Noble, att'ys for d'f't. March 31st, 1876.

Filed April 3rd, 1876.

C. DART, *Clerk*,
By GEO. C. REVIS, *D'p'y.*

Complainaint's amendment.—Filed April 3rd, 1876.

In the circuit court of the United States, 5th circuit, in and for the eastern district of Texas, sitting at the city of Galveston, State of Texas.

ISAAC S. HURT, COMPL'T,
vs.
D. M. HOLLINGSWORTH, D'F'T.

To the hon. the judges of said circuit court of the United States, in and for said eastern district of Texas:

And now comes Isaac S. Hurt, complainant in this cause, and amends his original bill or petition, and for amendment avers and charges:

1st. That he purchased the premises in question in good faith, being

said lot No. ten in block No. 90, and improvements on said lot, for a valuable consideration, about the 8th day of June, A. D. 1874, from said Anton Molsberger and his wife, Mary Molsberger, the same being the premises described in the original bill and amendment thereto; that before and at the time of the money judgment against said Anton Molsberger, to which his said wife was no party, rendered in favor
45 of said R. Marsh Denman & Co., against Anton Molsberger, the defendant herein being a member of that firm, and that before and at the time of the levy of the execution rendered on said judgment in the county court of Galveston County, and State of Texas, and at the time of the sale of said premises under said execution by Joseph Atkins, sheriff of said Galveston County, said lot No. 10 (ten) and improvements sn block No. 90, this complainant is now informed and verily believes and so charges to be true, was the separate property and estate of Mrs. Mary Molsberger, the lawful wife of said Anton Molsberger, and that the said lot of ground and improements thereon, as hereinafter stated, were the separate property and estate of said Mrs. Mary Molsberger at the time of this complainant's purchase of the said lot and all the improvements thereon from said Molsberger and wife.

This complainant further says that he is informed and verily believes and so charges to be true, that Mrs. Molsberger purchased said lot of ground from Henry Bennett, on or about the 19th day of December, A. D. 1865, for the sum of fifteen hundred dollars, and the conveyance was taken in the name of her husband without her knowl-
46 edge or privity; and that the funds and monies which paid for said premises to said Bennett were the separate property and estate of said Mrs. Molsberger, being in part the proceeds of the sale of her former homestead, the same being her separate property, derived from her mother by gift, and the residue being funds and moneys received from her said mother by donation and gift; the total of the said proceeds of said Mrs. Molsberger's former homestead, together with the sums of money given her by her mother, her name being Mrs. , amounted to about the sum 2,100.00 dollars, of which about 1,500 dollars was paid to said Bennett and the balance expended for improvements on said lot No. to make it suitable for her home and homestead and that of her family; which said former homestead of said Mrs. M lsberger was situate in the city of Galveston, and was sold by her and her husband, Anton Molsberger, to one .

2nd. Complainant is informed and believes and so charges to be true that the sale of said former homestead, the separate property of
47 Mrs. Molsberger, was for the sole purpose of investing the proceeds in the lot in suit as here separate property and homestead, which was done, but in the manner above set forth.

This complainant further alleges & charges that the first time and day he heard of or received the above information that the premises in question was the separate property and estate of said Mrs. Molsberger before and at the time of the said levy and sale under said execution was on the 17th day of February, 1876.

3d. That said fact of the said premises being the separate property and estate of said Mrs. Molsberger was not known to complainant at the time of filing his original or amended pleadings, and the complainant was not aware of the same in time to introduce said facts in the original bill, but said matters and things are now brought forward to support and strengthen his bill.

4th. And complainant further says that the matters and things set up in this amendment are not here set up and urged for the purpose of

vexation or delay, and that the matters and things contained in this amendment are highly material to support and strengthen his case; and he further says that prior to this cause being filed in the State
48 court, and since its removal into this court by d'f't, he made diligent search and inquiry for evidence and witnesses to sustain his case and title to said premises, and used all reasonable diligence to discover every and all necessary matters to insert in his original pleading, and that the could not with any reasonable diligence have introduced the matters of this amendment into his original bill or amendment thereto; and complainant now brings forward and urges said additional and newly discovered material matters and things to support and strengthen his bill and the prayer therein and in the amendment thereof.

Complainant renews his former prayer to remove the cloud from his title caused by said sheriff's deed of conveyance of said premises to the defendant in this suit, which is now of record in the land records of Galveston County for equity and general relief for such a decree
49 as the nature of his case demands.

ISAAC S. HURT,
Complainant.
By his counsel, WM. P. BALLINGER &
ALBERT N. MILLS.

The foregoing endorsed as follows: Filed April 3rd, 1876. C. Dart, clerk, by Geo. C. Rivis, d'p'y.

Order at rules, Monday, April 3d, 1876.—Filed April 3rd, 1876.

United States circuit court.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH.

And now, on the 1st Monday in April, 1876, being the rule day in chancery of this court, the plaintiff, Isaac S. Hurt, having filed motions to transfer said cause to the equity docket of said court, also for leave to amend the alleged bill of complaint, the proposed amendment having been filed with the clerk; also to strike out and dismiss the defendant's answer or plea in reconvention, or the cross-suit by
50 defendant, were brought before the judge of the court sitting at rules in equity, and the counsel of plaintiff was heard in argument thereon; but the court, considering that the said case is on the law-docket of this court, and has been submitted to the court for its judgment, and that there is no jurisdiction to hear said motions or either one of them at rules, because said cause is on the law-docket of the court, and there is no such cause on the equity docket, and said motions cannot be heard at rules, now refuses to entertain said motions or any of them.

AMOS MORRILL,
Dist. Judge.

The foregoing endorsed as follows: Filed April 3rd, 1876. C. Dart clerk.

From rules. Refusal of court to hear motions of pl'ff at rules, April 3d, 1876.—From rules. Monday, April 3rd, 1876.

United States circuit court.

ISAAC S. HURT
vs.
D. N. HOLLINGSWORTH.

51 And now, on the 1st Monday in April, 1876, being the rule-day in chancery of this court, the plaintiff, Isaac S. Hurt, having filed motions to transfer said cause to the equity-docket of said court, also for leave to amend the alleged bill of complaint, the proposed amendment having been filed with the clerk; also to strike out and dismiss the defendant's answer or plea in reconvention, or the cross-suit by defendant, were brought before the judge of the court sitting at rules in equity, and the counsel of plaintiff was heard in argument thereon; but the court, considering that the said case is on the law-docket of this court, and has been submitted to the court for its judgment, and that there is no jurisdiction to hear said motions, or either one of them, at rules, because said cause is on the law-docket of the court, and there is no such cause on the equity-docket, and said motions cannot be
52 heard at rules, now refuses to entertain said motions, or any of them.

(Signed) AMOS MORRILL,
Dist. Judge.

Entered, Monday, April 3rd, 1876.
Attest:

C. DART,
Clerk U. S. Circuit Court, E. D. T., G.

Motion of plaintiff to remand case back to State court.—Filed May 2nd, 1876.

U. S. circuit court, eastern district of Texas, at Galveston.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 891.

Now comes Isaac S. Hurt, plaintiff in the above-instittled suit, which has been removed into this honorable court by the defendant therein, D. M. Hollingsworth, and moves this court to remand the said cause and the record and proceedings therein to the district court of Galveston County, and he specifies the following, among others grounds, of said motion:

53 1st. That no such proceedings were taken by said Hollingsworth, defendant, in the district court of Galveston County, nor by said court, as authorized removal to this court.

2nd. That this court has not jurisdiction of said cause because the removal thereof into this court was not in conformity with the laws of the United States in that behalf.

3rd. Because no bond with sureity was filed in said district court by the said defendant as required by law for such removal, the instrument filed therefor appearing in the transcript herein, and the same not being a bond.

4th. Because the conditions of said instrument are not in conformity with law in that behalf, there being no condition therein for the payment of all costs that may be awarded in this court if this court shall hold that such suit was wrongfully are improperly removed thereto, and for other causes apparent in the said record & proceedings.

MILLS & TEVIS,
BALLINGER, JACK & MOTT,
Att'ys for Pl'tf.

The foregoing endorsed as follows: Filed May 2d, 1876. C. Dart, clerk.

54 *Opinion of court, Justice Bradley presiding, on motion of plaintiff.—Filed June 6th*, 1876.

HURT
vs.
HOLLINGSWORTH.

We think that the plaintiff is too late to move a dismissal of this case from this court. If the bond be not in all respects such as the act of March 3rd, 1875, requires, the formality was waived by assenting to proceed without objections. We are the more willing to apply the rule of waiver in this case, by reason of the fact that the law was passed only a few days before the removal of the cause, and probably had not, in fact, been brought to the attention of either party.

As to the objection that the case is intrinsically an equity case and not cognizable in a court of law, by reason whereof the plaintiff now asks for a retrial and a repleader, it is pertinent to observe that this court is a court both of law and equity, and has cognizance of both kinds of cases. Though it be true, therefore, that this cause is an equity cause, this court has cognizance of it; and the question simply becomes one of regularity of pleadings and proceedings. The
55 parties have waived all matters of mere form by going to final hearing on the merits and submitting the case to the court. The question then is, have the substantial rights of the parties been violated by the mode and form of proceeding which they have mutually pursued? The petition is certainly sufficient in substance to stand as a bill in chancery. It was such in effect in the State court, and the plaintiff did not see fit to alter it here. The answer and reconvention are substantially equivalent to an answer and cross-bill, and asks no more than could have been demanded by the defendant by a cross-bill. On these pleadings and on evidence offered to the court, documentary and oral, the case has been heard, and is now under advisement. We think that any irregularity in the form of proceeding has been waived, and that we ought not now to rehear and retry the case, or to grant a repleader. If the parties desire it, the substance of the oral evidence which was adduced before the court can be placed on the record.

Motion denied.

56 The foregoing indorsed as follows: Filed June 6th, 1876. C. Dart, clerk.

Judgment, June 6th, 1876.—From the minutes, May term, June 6th, 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 891.

This case came on for trial on the 17th day of February, 1876, the plaintiff appearing by his attorney and the defendant by his attorneys, and thereupon the said parties by their respective attorneys waived a jury by writing, signed by them, and submitted the matters therein as well of fact as of law to the court; and the court having heard the pleadings and evidence and arguments of counsel, and the court having taken time to consider, and being now fully advised, it is considered and adjudged by the court that the plaintiff take nothing by this suit, and the defendant having set up in his answer the ownership of the property in controversy in this suit, to wit, lot No. ten (10), in block No. ninety (90), in the city and county of Galveston, State of Texas, together with the improvements thereon, and having prayed a restitution of the same to him, the same being in the possession of the plaintiff, and having also claimed in reconvention rents for the use and occu-
57 pation of the said premises from the 8th day of June, 1874, to the 6th day of June, 1876, wherefore, upon further consideration of the said pleadings and evidence and argument of counsel, it is ordered, adjudged, and decreed that the defendant, D. M. Hollingsworth, have and recover from the plaintiff, Isaac S. Hurt, the title and possession of said lot No. 10 (ten), in block No. ninety, in the city and county of Galveston, State of Texas, together with the improvements thereon, and also the sum of four hundred and seventy-five dollars, as damages, for the use and occupation of said premises by the said plaintiff, and that a writ or writs of possession issue to put the said defendant in possession of the said recovered premises.

It is further considered that the defendant recover of the plaintiff all the costs about this suit incurred, and that execution issue therefor, as well as for the said damages.

Order, motion overruled.—From the minutes, May term, June 6th, 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH.

Before Hon. Joseph P. Bradley, judge.

The motions of the plaintiff herein, 1st, to remand the case back
58 to the State court of Galveston County, and 2nd, to transfer the case from the law to the equity docket of this court, having been duly considered, and the court being fully advised, it is ordered that the said motions be overruled.

Order, motions denied.—From the minutes, May term, Jun. 7th, 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } 891.

Ordered, that the order of the court entered in this cause on yesterday be set aside and the following entered in lieu thereof, to wit:

The motions of the plaintiff filed in this cause, 1st, to remand the same

back to the State court of Galveston County, and 2nd, to transfer the cause from the law to the chancery docket of this court, having been heard before this court of the 5th of June instant, the Hon. Joseph P. Bradley, associate justice of the Supreme Court of the United States, presiding, and having heard arguments of counsel, and said motions being duly considered, the same with the conclusions of the court are hereinafter set out as follows:

1*st motion.*—"Now comes Isaac S. Hurt, plaintiff in the above-entitled suit, which has been removed into this honorable court by the de-
59 fendant therein, D. M. Hollingsworth, and moves this court to remand the said cause and the record and proceedings therein to the district court of Galveston County; and he specifies the following among others grounds of said motion:

"1st. That no such proceedings were taken by said Hollingsworth, defendant, in the district court of Galveston County, nor by said court, as authorized removal to this court.

"2nd. That this court has not jurisdiction of said cause, because the removal thereof into this court was not in conformity with the law of the United States in that behalf.

"3rd. Because no bond with surety was filed in said district court by the said defendant as required by law for such removal, the instrument filed therefor appearing in the transcript herein, and the same not being a bond.

"4th. Because the conditions of said instrument are not in conformity with law in that behalf, there being no condition therein for the payment of all costs that may be awarded in this court, if this court shall hold that such suit was wrongfully or improperly removed thereto,
60 and for other causes appearing in the said record and proceedings.

2*nd motion.*—"And now comes the plaintiff in this cause by counsel and respectfully moves the court to take this the above entitled and numbered cause from the common law side of the said circuit court docket and transfer the same to the chancery docket of said circuit court to be there proceeded in agreeable to the rules and practice of said circuit court sitting in chancery; and this motion is made on the grounds:

"1st. That the cause originally brought from the State court of Galveston County to this circuit court by the defendant herein was improvidently placed by said defendant on the law docket of the said circuit court of the United States.

"2nd. That said circuit court of the United States sitting as a law court has no jurisdiction to try this cause as a law court, nor to grant the relief prayed for by the plaintiff herein, unless said cause is transferred to the chancery docket of the said circuit court to be proceeded in according to the rules and practice of said circuit court sitting in chancery. The defendant in this cause, or his attorney of record, will please take notice that this motion will be called up by plain-
61 tiff for disposition by the judge at the April rule day in chancery A. D. 1876, or at such time thereafter as the same can be heard."

Opinion of the court.—"We think that the plaintiff is too late to move a dismissal of this case from the court. If the bond be not in all respects such as the act of March 3rd, 1875, requires, the formality was waived by assenting to proceed without objections. We are the more willing to apply the rule of waiver in this case by reason of the fact that the law was passed only a few days before the removal of the cause,

and probably had not, in fact, been brought to the attention of either party.

"As to the objection that the case is intrinsically an equity case, and not cognizable in a court of law, by reason whereof the plaintiff now asks for a retrial and a repleader, it is pertinent to observe that this court is a court both of law and equity, and has cognizance of both kinds of cases. Though it be true, therefore, that this cause is an equity cause this court has cognizance of it; and the question simply becomes one of regularity of pleadings and proceedings. The parties
62 have waived all matters of mere form by going to final hearing on the merits and submitting the case to the court.

"The question then is, have the substantial rights of the parties been violated by the mode and form of proceeding which they have mutually pursued? The petition is certainly sufficient, in substance, to stand as a bill in chancery. It was such, in effect, in the State court, and the plaintiff did not see fit to alter it here. The answer and reconvention are substantially equivalent to an answer and cross bill, and ask no more than could have been demanded by the defendant by a cross bill. On these pleadings and on evidence offered to the court, documentary and oral, the case has been heard, and is now under advisement. We think that any irregularity in the form of proceeding has been waived; and that we ought not now to rehear and retry the case, or to grant a repleader. If the parties desire it, the substance of the oral evidence which was adduced before the court can be placed on the record.

"Motion denied."

Wherefore it is ordered by the court that the said motion be denied.

63 *Motion for new trial.—Filed June 8th*, 1876.

In the circuit court of the United States, 5th circuit, eastern district of Texas, at Galveston.

ISAAC S. HURT, PL'F't,
vs.
D. M. HOLLINGSWORTH, D'F't. } C. L., 891.

And now comes the plaintiff, Isaac S. Hurt, and applies to and moves and prays the court to set aside the judgment rendered in this cause on the 6th day of June, 1876, and to rehear said cause and to grant a new trial and rehearing therein in accordance with the usual practise of the court; and the said plaintiff sets forth the following grounds and exhibits in support of this motion and application:

1st. That the suit of plaintiff was in the nature of a suit or bill in equity to remove a cloud from his title to the land and premises in question, and not of an action at law to maintain title or recover possession thereof or for damages; and that on the removal of the cause to this court from the Galveston County district court, by the defendant, Hollingsworth, who was a citizen of Louisiana, the said cause was placed by the clerk on the law docket of the circuit court of the United States, for the eastern district of Texas, No. 891, but that the
64 said cause should have placed on the equity side of said circuit court docket and proceeded with and heard as a suit in equity, which was not done, but the cause was proceeded with and tried by the court as a law , this pl'f't having, at the time, unadvisedly, irregularly, and improvidently consented that said equity cause should be tried in

the law court and as a law case, which proceeding was not within the jurisdiction of said law court, and were coram non judice in that respect.

2nd. Because the reconvention claim of defendant Hollingsworth was irregular, and the reconvention claim setting up another title was in the nature of a cross-bill or cross-suit praying a substantive and affirmative judgment and also relief against said plaintiff and for damages; which said reconvention suit against said plaintiff Hurt was improvidently entertained, considered, and made the basis of the judgment *of the judgment* rendered, because said Hurt here alleges and shows that said cross-suit or reconvention made no parties defendant thereto and prayed no process to make any parties defendant to said cross petition or reconvention suit, nor was any such process issued, nor were
65 any defendants made thereto, and said reconvention suit was proceeded with without any defendant thereto or without any process therefor; and said Hurt says that the said proceedings under and the judgment on said cross-suit against him are irregular and void and ought to be set aside.

3rd. That the said judgment or decree rendered is rigorously severe, contrary to law, and oppressive, and excessive, in this, that under and by virtue of said Hollingsworth's cross-petition or cross-suit without a defendant thereto and without process, the judgment or decree awards to said Hollingsworth the property in question and a monied judgment against said Hurt of $475.00, which said land and premises and appurtenances were acquired by said Hollingsworth for $30.00, the same being valued over $5,000.00, but which was sacrificed at said sheriff's sale for said $30.00, inasmuch at the time of said sale the common understanding and notoriety was that the same was the homestead of Molsberger and family, which is wholly in'quitable, unjust, and oppressive.

4th. That considering said cross-petition or reconvention suit
66 as a law proceeding in this hon. court, then the judgment rendered is wrongfully and improperly given for said Hollingsworth in this, that his answer in reconvention shows and alleges, and the evidence on the trial so showed, that prior to the sheriff's deed to Hollingsworth Oct. 3rd, 1873, that said Molsberger and wife had conveyed the property sued for to R. T. Wheeler, to wit, on the 18th day of Oct., 1872, which deed of conveyance was duly recorded, and whatever equitable right Hollingsworth might have obtained by his said purchase from the sheriff on the 3rd Oct., 1873, he did not acquire by said purchase any legal right or title sufficient to recover the title and possession of the premises in question in a suit of law, or in his cross-petition or reconvention claim filed in this case, he having no such legal right or title as a basis of recovery.

5th. That the judgment or decree rendered is against all the evidence touching the alleged abandonment of the premises as the homestead of said Molsberger and family, the evidence abundantly showing that at the time of said sheriff's levy and sale, Molsberger & wife had acquired no other homestead elsewhere; that they temporarily suspended
67 the personal use and personal occupancy of a part of said premises from about the year 1872; that about that time, said Molsberger having no employment in the city of Galveston from which to support *of* his wife and children, and needing the rents and revenues of said premises for their said support beside his own labor, he, with his wife and family, went down the island on a tract of land, without rent or writing, obtained from Dr. Wm. R. Smith, through H. M. Trueheart, his agent, in order to raise hay, corn, & the like, to assist in the sup-

port of his family & schooling his children; besides, his removal upon said land was for the purpose of taking care of a small stock of cattle & hogs which at that time were running in the neighborhood of said Smith tract of land about fifteen miles from the said city of Galveston; that said Molsberger and wife and family went on remained on said land for the above purpose only until they sold said premises to plaintiff Hurt, about the 8th day of June, 1874; that while they were on said Smith tract of land, and up to the said 8th day of June, 1874, said Molsberger rented out a portion of said premises to tenants for the
68 object above named, without the slightest idea or intention of abandoning or surrendering their homestead or any of their constitutional or legal rights thereto, but on the contrary claiming and asserting the same, especially by Mary Molsberger, his wife; that while they were on said tract of land, a part of the premises in suit, one of the tenements and the stable on said premises, were specially retained for the personal use, enjoyment, and actual occupancey of his said family when they came to this city, which was quite frequent as to one and another of his said family; and especially was it retained for the personal use and occupancy for some of his children who were attending at that time the public schools in the city of Galveston.

6th. That the judgment or decree is against the uncontradicted evidence of Molsberger & wife on the trial that her former homestead, her separate property, in said city was sold by herself and husband, and out of the proceeds thereof about $1,500.00 was invested in the purchase of the property in suit as and for her homestead, and that of her family, bought from Henry Bennett, and that about $600.00 of her separate estate, derived from her mother by gift, was expended in improv-
69 ing the premises in suit.

7th. That the judgment or decree against plaintiff Hurt is contrary to the State constitution and State laws in force at the time, as applied to homestead and rights therein and thereto, which judgment sustains a sheriff's deed to said premises as a homestead without sufficient evidence of any abondonment thereof, and without said homestead owners having acquired any other homestead whatever; and plaintiff Hurt alleges that substantial justice between the parties has not been reached by the decision in this cause.

WM. P. BALLINGER &
ALBERT N. MILLS,
Atty's for Plaintiff.

In support of the motion plaintiff Hurt, on oath, says that on a new trial or rehearing he will be abundantly able to show that at the time of the sheriff's sale of the premises in suit that it was a matter of public notoriety in the city of Galveston that said premises were known and claimed, and in part personally and actually occupied at various periods, as the homestead property of said Molsberger and family,
70 all of which was well known to the defendant, Hollingsworth, or his agents and att'ys; and for this reason alone he will be able to establish by proof that no one attending said sheriff's sale would bid anything for said property at said sale, and that said Hollingsworth, one of the plaintiffs in the execution, was forced, for such reason, to bid in said property to compel a sale under said writ, and this by the att'ys of the original plaintiffs in the execution, Mrs. Molsberger being no party to said suit. He will be able to show that persons who attended said sale refused to bid for the above-stated reasons. That he will be able to satisfactorily show the court that up to the time of the sale of the prem-

ises in suit to Hurt, that Molsberger and wife had acquired no homestead on the Smith tract of land and nowhere else; that they always considered and referred to the premises in suit as their home and homestead until they sold to Hurt; that the family was in indig*u*ent circumstances and went on the Smith place without rent or writings, and put up a small cabin for their *their* tempo'ry use; that they went on to said land to assist in raising their family and to make a living, at which place they had a small stock of horses, cattle and hogs. That
71 Molsberger and wife sold said property in suit to Hurt as their homestead property, & said Hurt dealt with them on the basis that it was their homestead property, & this after making due inquiry; that it was the common reputation and belief that the premises in suit was the homestead of Molsberger & wife at the time of said sheriff's sale, and also at the time of Hurt's purchase from them; that a large part of the purchase money paid by Hurt went to pay for the present homestead of Maltsberger & wife which they have acquired on Galveston Island; that a part of the premises in suit were specially retained for the personal occupancy and personal use & enjoyment of his family & children, the latter using the same with their horses while they were going to school in the city of Galveston, & his wife using the same whenever she would come to the city, which was frequent; that such was the general and pervading reputation and belief that the property in suit was and continued to be the homestead of said family at the time of the sheriff's sale, and also at the time of the sale to Hurt, that no judgment creditor would risk a levy thereon, and this under the common repu'tion up to during those periods that the prem-
72 ises in suit was the homestead of Malsberger & wife.

Further, he will abundantly show on another trial that prior to the purchase of the premises in suit by them from Henry Bennett, 19th Dec., 1865, that said Malsberger and wife had a homestead property in said city of Galveston, situated in the same neighborhood as the property in question, which said former homestead was derived by gift from the mother of Mrs. Maltsberger, which said former homestead was sold by said Malsberger and wife to , for the sum of $2,100.00, and $1,500.00 of said $2,100.00 was paid to Henry Bennett by her as the purchase money of the premises in suit, and that about $600.00 thereof was spent by her on said last-named premises in improvements thereon, and that said premises and said improvements are and were her separate property and estate at the time of said sheriff's sale, and also at the time of the sale by them to Hurt; that no part of the purchase money for said premises in suit was ever paid by said Maltsberger, who has always been in needy circumstances and unable to buy and pay for a home for his family, but that said purchase money was his wife's separate property, and used and invested as such for her benefit and
73 that of her children and family. All of which matters and things he will prove to the satisfaction of the court on another trial, from which no material injury can result to said defendant Hollingsworth as the property involved is immovable & this plaintiff's solvency is not questioned.

He asks, therefore, a new trial upon such terms as the court may think right in the premises, and further that justice be done, which he says has not been reached, considering all the circumstances of this case. And affiant further states most positively that the first time he even heard or knew that the purchase-money of the premises in suit was the separate property of Mrs. Moltsberger, and that said purchase-money was the proceeds of the former separate estate of the said wife,

was when and at the time said facts were testified to on the trial by said Maltsberger & wife, which is the true and only reason and cause said matters were not set up in reply to the defendant's answer, but which they are ready to set up and prove to the entire satisfaction of the court, & which would have been set up and relied on if they had been discovered before the commencement of the trial; & he says that the law and justice demands that he have an opportunity to set
74 up the same on a rehearing or new trial; & affiant says he made every inquiry of said Maltsberger & wife about said title, but no intimation was ever him by them, or either of them, that the premises in suit was the separate property of the wife until testified to by them on the trial; but they, on all & every occasion before, and at the time of the conveyance to this affiant, and had ever been their homestead property and home, & that they had required none other.

The matters and things stated in this affadavit are true.

I. S. HURT,
Plaintiff.

Subscribed and sworn to before me this June 7th, 1876.

C. DART, *Clerk*,
By GEO. C. RIVES, *Dep'y.*

The foregoing indorsed as follows: Filed June 8th, 1876. C. Dart, clerk, by James T. Spann, dep't.

Notice of motion for new trial.—From motion docket June 8th, 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } 891.

This day came the plaintiff & filed herein a motion for a new trial in this case.

Attest:

C. DART,
75 *Clerk U. S. Circuit Court, E. D. T. G.*,
By GEO. C. RIVES, *Dep'ty.*

JUNE 8TH, '76.

Affidavit of Anton Molsberger, exhibit to plaintiff's motion for new trial.—Filed June 12th, 1876.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } C. L., 891.

Before me, the undersigned authority, personally appeared A. Maltsberger, to me well known, being duly sworn, says that he is the Antoine Maltsberger mentioned in the pleadings and evidence in this case, and that at the time of the sheriff's levy and sale of the lots and premises in controversy affiant and his wife and family had acquired no other homestead & had no other homestead or claimed none other than the premises in suit; that affiant and his wife temporarily suspended the personal occupancy & personal use of a part of said premises from the summer of the year 1872, and affiant having no employment in the city of Galveston from which to support his family, & greatly needing the

rents and revenues of said premises for their support in addition to his own labor, affiant, with his wife & family, went down Galveston Island and finally went on a tract of land owned by Dr. Wm. R. Smith,
76 without writing or rent, the permission being obtained from his agent, H. M. Trueheart, of this city; that affiant adopted this course to raise hay, corn, and the like to assist in the support of his family and schooling his children, and also to take care of a small stock of cattle & hogs which at that time were running in the neighbourhood of said land, this about 18 miles from the city; that affiant & family went on & remained on said land for the above purposes only until affiant and his wife sold & conveyed said premises to the plaintiff Hurt, about the 8th day of June, 1874; that while affiant & family were on said Smith land, and at the time they went thereon for the purposes & with the sole intent and object as stated above, and up to the sale and conveyance to Hurt, said affiant rented out a part of said premises to tenants for the objects above named, without the slightest idea, intent, or purpose of abandoning or surrend'ing their said homestead or any of their constitutional or legal rights thereto, but on the contrary they claimed and asserted the same from the time they went on said land up to said sale to Hurt, and especially was said claim made by Mrs. Malsberger, affiant's wife, during said time or interval.

77 Affiant also says that while he & his family were on said land, without rent & as above stated, a part of the premises in suit, one of the tenements and the stable thereon, were specially retained for the personal use, enjoyment and actual occupancy of his said family when any member thereof (including affiant) came to this city, which was frequent with one or the other of his said family, and especially was said tenement & stable retained for the personal use and occupancy of affiant & wife when they came to the city, & they occupied & used said tenement as their home for several days at a time, and always slept there, as also his children, and where they had the best part of their hous'hold furniture and dishes & cooking utensils, &c., and which remained and continued to remain in said tenement from the time they first went down Galveston Island until after the sale & conveyance to Hurt; that affiant used said stable for his horses whenever he & himself and wife would come to the city, which was frequent during said interval; and affiant during all of said time or interval kept suitable horse feed in said stable under lock and key, as also said tenement; and affi-
78 ant continued to have said property assessed as his homestead up to the of the sale to Hurt. Affiant further says that his wife and himself had a homestead property, her separate estate, received from her mother, in the city of Galveston, previous to their purchase from Bennett of the premises in suit, which said former homestead was a house and lot in the block of lots south of the premises in question, which former homestead was sold by affiant & wife, through their agent, P. H. Moser of this city, to Chas. A. Gamble of Georgia, for the sum of about $2,100 in gold coin, and this done in the year 1865; this former homestead property was given to affiant's wife by her mother, Johanna Quittey, then living in this city; and out of and from the proceeds of said former homestead about $1,500 was paid to said Bennett for the premises in suit as and for the home & homestead of affiant, his wife and family, and that about 600 dollars of said 2,100 dollars was expended on and for the improvements of the premises in suit.

Affiant also states that he has no recollection of ever having stated to said Hurt at any time that the proceeds of his former home-
79 stead was the separate property of his wife or that said former

homestead was her separate estate, and affiant remembers that he and his wife stated on the trial before the court that said former homestead & proceeds were her separate estate, & that the property in suit was her separate estate, & affiant is well satisfied that said Hurt did not know said fact until during said trial.

Affiant also says that he has read attentively the affidavit of Hurt appended to his motion for new trial, & that all material matters and things therein stated concerning affiant's homestead claim & that of his wife, & that of their separate estate, are true, to the best of his knowledge, recollection, & belief. That the purchase money received from Hurt was subsequently invested in a homestead on said Smith land, and which was bargained for at the time of the sale & conveyance to said Hurt.

ANTON MOLSBERGER.

Sworn to & subscribed before me June 12, 1876.

C. DART, *Clerk*,
By GEO. C. RIVES, *Dep'ty.*

The foregoing indoresed as follows: Filed June 12th, 1876. C. Dart, clerk, by Geo. C. Rives, dep'ty.

80 *Order, 1st day of hearing on motion for new trial.—From the minutes May term, June 20th, 1876.*

ISAAC S. HURT
vs. } 891.
D. M. HOLLINGSWORTH.

This day again came the parties to this suit, by their attorneys, and thereupon came on to be heard the motion of the plaintiff, Isaac S. Hurt, for a new trial in this case, and the same not being concluded, the further hearing thereof is postponed until to-morrow.

Order, 2d day of hearing on motion for new trial.—From the minutes May term, June 21st, 1876.

ISAAC S. HURT
vs. } 891.
D. M. HOLLINGSWORTH.

On this day again came the parties to this suit, by their attorneys, and thereupon the hearing upon the motion of the *motion of the* plaintiff for a new trial in this cause was resumed, and the same not being concluded, the further hearing thereof is postponed until to-morrow.

Order, motion for new trial overruled, appeal allowed, & notice of writ of error.—From the minutes, May term, June 22nd, 1876.

ISAAC S. HURT
vs. } 891.
D. M. HOLLINGSWORTH.

On this day again came the parties to this suit, by their attorneys, and thereupon the hearing upon the motion of the plaintiff herein
81 for a new trial in this case was resumed; and the court having

fully heard the said motion and argument of counsel, and duly considered the same, and the court being fully advised in the premises, it is ordered that the said motion be overruled.

Thereupon the said plaintiff, by his attorneys, gave notice of appeal from the decision, judgment, or decree of this court to the Supreme Court of the United States, and the said appeal was allowed by the court upon the plaintiff entering into the bond with sureties in the sum of one thousand dollars. Said plaintiff also announced that a writ of error would be applied for, and the court fixed the bond therefor in the same amount, of one thousand dollars.

Statement of facts & bills of exceptions. Filed June 24th, 1876.

Case tried in the circuit court of the United States in and for the eastern district of Texas, at Galveston, Texas.

ISAAC S. HURT, COMP'T,
vs.
D. M. HOLLINGSWORTH, DEF'T. } No. 891.

Statements of facts, rulings of the court on the trial, and bill of exceptions.

Pleadings being read, complainant read without objection conveyance from Malshberger and wife to complainant for the premises in question.

82 *Statement of facts cont'd.—Exhibit A.*

EXHIBIT A.

General warranty deed.

THE STATE OF TEXAS,
County of Galveston:

Know all men by these presents, that we, Anton Molsberger and wife, Mary Molsberger, of said State and county, parties of the first part, in consideration of the sum of twenty-six hundred and twenty-five dollars in current money to us cash in hand paid by Isaac S. Hurt, also of said State and county, the receipt of which is hereby fully acknowledged, have granted, bargained, and sold, and do hereby grant, bargain, sell, alien, convey, and confirm, unto the said Isaac S. Hurt, party of the second part, his heirs and assigns, forever, that certain lot or parcel of ground lying and being in the city and county of Galveston, State of Texas, and known on the city company's map of said city as lot No. ten (10) in block number ninety (90), with the buildings and improvements thereon and thereto belonging, being the same property conveyed by J. L. Darragh to Henry Bennett, January 30th, 1860, recorded in Galveston County records in book T, on pages 432 and 433, and by
83 said Bennett conveyed to said Anton Molsberger, December 19th, 1865, recorded in Galveston County records, in book U, on pages 140 and 141. To have and to hold, all and singular, the above described and conveyed premises and property, with all the rights, privileges, hereditaments, and appurtenances thereto belonging, or in any wise appertaining, unto the said Isaac S. Hurt, party of the second part, his

heirs or assigns, forever; and we, the said parties of the first part, do hereby bind ourselves and our heirs, executors, and administrators unto the said party of the second part, his heirs and assigns, that we are well seized of all and singular the said property and premises, that we have good right and lawful authority to make this sale and conveyance of the same; that said property and premises are free and clear of all and every incumbrance, and that unto the said party of the second part, his heirs and assigns, we and our heirs, executors, and administrators will forever warrant and defend the same against all adverse lawful claim or claims whatsoever.

In testimony whereof we do hereunto affix our hands and seals, using scrolls for seals, this day of June, A. D. one thousand eight and seventy-four.

84 ANTON MOLSBERGER. [SEAL.]
MARY MOLSBERGER. [SEAL.]

Witnesses at the request of the grantor:
H. M. TRUEHEART.
ROBERT DICKINS.

THE STATE OF TEXAS,
Galveston County:

Before me, Wm. R. Johnson, a notary public in and for Galveston County, this day personally appeared Anton Molsberger and Mary Molsberger, his wife, parties to the foregoing conveyance, who severally acknowledged that they had executed the foregoing conveyance for all the purposes and considerations therein expressed, and she, the said Mary Molsberger, having been examined by me privily and apart from her said husband, and having the same fully explained to her, she, the said Mary Molsberger, declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Witness my hand and impress of my official seal, at my office in the city of Galveston, this eighth day of June, 1874.

[SEAL.] WM. R. JOHNSON,
Notary Public G. C.

85 THE STATE OF TEXAS,
County of Galveston:

The foregoing annexed deed of conveyance was filed for record in this office June 9th, A. D. 1874, at 5 o'clock p. m., and recorded June 17th, A. D. 1874, at 10 o'clock a. m., in book thirteen, pages 316 & 317.

In witness whereof I, David Wakelee, clerk of the district court of Galveston County, hereto subscribe my name and affix the seal of said court this 17th day of June, A. D. 1874.

[SEAL.] DAVID WAKELEE, *Clerk.*

The foregoing deed indorsed: Filed for record June 9th, 1874, at 5 p. m. David Wakelee, clerk D. C. G. C.

Statement of facts cont'd.

Complainant also read without objection the deed made by Joseph Atkins, sheriff of Galveston, to the defendant, D. M. Hollingsworth, marked B.

Statement of facts cont'd.—Exhibit B.

EXHIBIT B.

THE STATE OF TEXAS,
County of Galveston:

Know all men by these presents that, whereas, by virtue of a writ of execution issued by the clerk of the district court of Galveston County, in a certain cause wherein R. Marsh Deman and D. M. Hollingsworth were plaintiffs, and Antone Malsberger was defendant, and
86 No. 236, and in which there was a judgment rendered in the county court of Galveston County on the 9th day of April, 1869, against the said defendant, and said writ of execution was directed and delivered to me as sheriff of the county of Galveston, State of Texas, commanding me of the goods and chattels, lands and tenements, of the said defendant to make certain monies in said writ specified.

And I, Joe Atkins, sheriff as aforesaid, did on the 15th day of September, A. D. 1873, levy on all the right, title, *title* and interest to the premises hereinafter described; and on the first Tuesday (7th day) in October, A. D. 1873, within the hours prescribed by law, I sold said *said* premises hereinafter described as public vendue in front of the court-house door, having first given public notice of the time and place of such sale by causing an advertisement thereof to be posted up in three public places in the county of Galveston, one of which was at the door of the court-house thereof for twenty full days previous to said sale, and whereas at said sale D. M. Hollingsworth bidding therefore the sum of thirty dollars, and that being the highest and best bid
87 for the same, it was struck off to him for said amount:

Now, therefore, in consideration of the premises aforesaid and of the payment of the said sum of thirty dollars, the receipt of which is hereby acknowledged, I, Joe Atkins, sheriff as aforesaid, have sold, and by the' presents do bargain, grant, sell, and convey unto the said D. M Hollingsworth all the right, title, and interest of the defendant so had on the 9th day of April, A. D. 1869, or at any time afterwards, of, in, and to the following described premises, to wit, lot number ten (10) in block number ninety (90), and the improvements situated therein, lying and being situated in the city and county of Galveston, State of Texas: To have and to hold the above described premises unto the said D. M. Hollingsworth, his heirs and assigns forever, as fully and as absolutely as I, as sheriff as aforesaid, can convey by virtue of the aforesaid writ of execution.

In testimony whereof I have hereunto set my hand and using scrawl in lieu of seal this 13th day of October, A. D. 1873.

JOE ATKINS,
Sheriff Galveston County.

The above interlination, 2nd page, 12 line, was made before signing.

88 JOE ATKINS,
Sheriff Galveston County.

THE STATE OF TEXAS,
County of Galveston:

Before me, Johnson Reed, clerk of the district court of Galveston County, this day appeared Joseph Atkins, sheriff Galveston Co., to me well known, who acknowledged his signature to the foregoing instru-

ment of writing and declared it to be his act and deed for the purpose and considerations therein expressed.

Given under my hand and the seal of said district court this thirteenth day of October, A. D. 1873.

[SEAL.]

JOHNSON REED,
Clerk D. C. G. Co.
By E. S. FLETCHER,
Dep'ty Clerk.

STATE OF TEXAS,
County of Galveston:

The foregoing annexed deed was filed for record in this office Oct. 13th, A. D. 1873, at 2.00 o'clock p. m., and recorded the same day, A. D. 1873, at 3.10 o'clock p. m,, in book 11, page 350–1.

In witness whereof I, Johnson Reed, clerk of the dist. court of Galveston County, hereto subscribe my name and affix the seal of said court this 13th day of Oct., A. D. 1873.

[SEAL.]

JOHNSON REED, *Clerk.*
89 By E. S. FLETCHER, *Deputy.*

The foregoing deed indorsed: Filed for record Oct. 13th, 1873, at 2 o'clock p. m. Johnson Reed, clerk, by E. S. Fletcher, dep'ty clerk.

Statement of facts continued.

It was admitted by defendant on the trial that the premises in question, at the time of the sheriff's levy and sale, were occupied by the tenants of complainant's vendors, Malsberger and wife. Plaintiff also read, without objection, deed from Henry Bennett to Antoine Malsberger, marked B[a].

Statement of facts cont'd.—Exhibit B[a].

EXHIBIT B[a].

THE STATE OF TEXAS,
County of Galveston:

Know all men by these presents that I, Henry Bennett, of the county of Galveston, State of Texas, for and in consideration of fifteen hundred dollars to me in hand paid by Anton Molsberger, of the said county of Galveston and State of Texas, the receipt whereof is hereby acknowledged, have bargained, aliened and conveyed, and by these presents do grant, bargain, sell, alien and convey unto the said Anton Molsberger, his heirs and assigns, the following described prop-
90 erty, to wit: all that certain lot or parcel of land lying and being in the city and county of Galveston, State of Texas, and known on the map of the Galveston City Company as lot number ten (10) in block number ninety (90), in said city, with the dwelling, outbuildings, and all other hereditaments and appurtenances standing thereon:

To have and to hold the above-described property to him, the said Anton Molsberger, his heirs and assigns, forever; and I, the said Henry Bennett, for myself and heirs, executors, administrators, covenants with the said Anton Molsberger, his heirs, executors, administrators and assigns, to warrant and forever defend the title to the property hereby conveyed, and hereinbefore described, to his, the said Anton Molsberger, his heirs and assigns forever, against the lawful claim or claims of all persons claiming or to claim the same.

In witness whereof I, the said Henry Bennett, hereunto subscribe my name and seal, using scrawl in lieu of seal, this the nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five.

HENRY BENNETT. [SEAL.]

Witness:
HENRY EDWARDS.
PAUL HEYEN.

91 [One dollar & fifty cents revenue stamps cancelled.]

THE STATE OF TEXAS,
County of Galveston:

Before me, Oscar Farish, clerk of the county court of Galveston County, this day appeared Henry Bennett, to me known, who acknowledged the above foregoing deed to be his act and deed for the consideration and purposes therein stated.

Given under my hand and the seal of said court this 10th January, A. D. 1866.

[SEAL.] OSCAR FARISH, *Clerk.*

THE STATE OF TEXAS,
County of Galveston:

The above and foregoing deed was filed for record Jan. 10th, 1866, at 10 a. m., and was recorded Jan. 13th, 1866, at 8 a. m., book U, pages 140 and 141.

In witness whereof I, Oscar Farish, clerk of the county court of Galveston County, hereto subscribe my name and affix seal of said court this the 13th January, 1866.

[SEAL.] OSCAR FARISH, *Cerk.*

The foregoing indorsed as follows, to wit: Lot No. 10. Block 90. City and county of Galveston, with dwelling and appurtenances.

Filed Jan. 10th, 1866, at 10 a. m.

OSCAR FARISH, *Clerk.*

92 *Statement of facts continued.—Testimony of Anton Molsberger.*

Malsberger, witness for complainant, testified that the premises in question at the time of the levy and sale of the premises by the sheriff was his homestead and that of his family, consisting of a wife and three children; that the premises had been his homestead since 1865; that long before and at the time of the sheriff's sale and up to the time of the sale of the same by him and his wife to complainant, said premises were claimed and used by him and his family as their homestead; that before the sheriff's sale he had rented out two of the tenements on the lot to tenants, and that they continued so rented down to the date of the conveyance to complainant; that during the tenantcies he and his family used and occupied a third tenement on the lot in question, and also a stable on the lot; that about the month of May or June, 1872, witness leased from Trueheart with the privilege of purchase a tract of land on Galveston Island, in Galveston County, about fifteen miles from the city of Galveston, where he took his family and part of his furniture, where he raised some crops of hay and corn; that every few days
93 witness or his wife or one of the children would be in the city of Galveston and use and occupy said tenement & use said stable

for horses; that neither he nor his wife ever abandoned said premises as their homestead; that they rented it out as above stated to assist in the support of his family; that he and his wife openly and notoriously and on all occassions up the time of the sheriff's sale claimed and asserted the same to be their homestead, and that witness so told the sheriff at the time he asked for a levy. Mr. Trueheart advanced the money to redeem the mortgage to Wheeler which was sold to defendant; it was mortgaged at the time of sheriff's sale.

Statement of facts cont'd.—Testimony of Mrs. Molsberger.

Mrs. Molsberger, for complainant, testified she was one of complainant's vendors; that they went down Galveston Island as stated by her husband; that she never had any idea of giving up her homestead in the city until they bought another; that she and her husband always claimed the property in question as their homestead; that they rented out a part of it and retained a part for use as they came to the city; that before they bought the premises in question in 1865 her mother gave her some separate estate, which she sold, and the money went to buy the premises in question and to improve the same, and that
94 from the date of their purchase in 1865 down to date of sale to complainant he and his family had no other homestead.

Statement of facts cont'd.—Testimony of Sheriff Atkins.

Sheriff Atkins testified that the general understanding at the time of the sheriff's sale was that the premises in suit was the homestead of Molsberger and wife.

Statement of facts cont'd.—Ttestimony of Wm. Seiffert.

Wm. Seiffert, deputy sheriff under Sheriff Atkins, testified he called upon Molsberger with the execution, and he answered he had no property to point out. My belief is he was living down the island at the time, and it was seldom he was seen in Galveston, as I was looking for him with the execution.

Statement of facts cont'd.—Testimony of H. M. Trueheart.

Trueheart, for complainant, testified that as agent of Wm. R. Smith he rented land down Galveston Island to Molsberger. Witness authorized Molsberger to go on the tract he rented with the privilege of purchasing. Malsberger built a house there, with the understanding that he should rent with the privilege of purchasing. I understand that Malsberger lived on the island place during the time he occupied it, and did not live in his homestead. I had written authority to sell the homestead in town. After Malsberger and wife sold the premises in suit to Hurt he bought a part of that Smith tract from me as agent; the proceeds of the sale to Hurt were applied to the purchase of the Smith tract; the whole matter passed through my hands.
95 Wheeler, trustee, had a deed of trust on the lot in suit; they were about to sell under that trust. I loaned Malsberger the money to pay off that deed of trust. I think the sheriff's sale was made before the deed of trust was paid off. About 300 dollars of the purchase money from Hurt was left in witnesses hand to pay att'ys to clear off the title.

Statement of facts cont'd.—Testimony of S. W. Sydnor.

Sydnor, for defendant, testified that in 1873, while he was a real estate agent, Malsberger wanted to borrow money on the premises in suit. I told him it was extremely difficult to borrow money on a homestead, and he said that he claimed his homestead down Galveston Island.

Statement of facts cont'd.—Testimony of Jos. Franklin.

Franklin, for defendant, testified that the two houses on the lot in suit ought to rent for 15$ each per month. Don't know as to the rental of the brick house. Defendant read in evidence the deed of trust from Malsberger & wife to Wheeler, trustee, to secure a debt due Wm. Weiner, marked "C."

Statement of facts cont'd.—Exhibit C.

EXHIBIT C.

THE STATE OF TEXAS,
County of Galveston:

Know all men by these presents that we, Antone Molshberger and Meri Molshberger, husband & wife, of Galveston, being justly indebted to William Werner, of Galveston, county of Galveston, in the
96 sum of three hundred ($300.00) dollars, evidenced by our promissory note of even date herewith, due and payable to the order of William Werner, as follows: ($300.00.) Galveston, Texas, Oct. 18th, 1872. Twelve months after date we promise to pay to William Werner or order three hundred dollars, with interest from date at two per cent. per month, interest payable quarterly.

This note is secured by deed of trust on lot 10, in block 90, with improvements, in the city of Galveston.

(Signed) ANTONE MOLSHBERGER.
MERI MOLSHBERGER.

And being desired to secure to the said William Werner, his heirs and assigns, the punctual payment of said promissory note, in consideration of said indebtedness and for the further consideration of ten dollars, to us paid by Royall T. Wheeler, of Galveston, the receipt whereof is hereby acknowledged, we have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Royall T. Wheeler and his assigns the following described property, viz:

That certain lot or parcel of ground lying and being situated in the city and county of Galveston, State of Texas, and known and designated on the map of said city as lot number (10), in block number (90), with all the buildings and improvements thereon situated and thereto belonging or in any wise incident or appertaining; in trust that
97 we are to have the possession, use, and control of said property, and to take the rents, issues, and profits thereof, until default made in the payment of our said promissory note; in trust, also, that if our said promissory note is punctually paid at maturity, with the accrued interest, then the said Royall T. Wheeler will release said property from this conveyance, we paying expenses; in trust, also, that if we fail to pay our said promissory note when due, the whole shall mature, and the said trustee shall be entitled to the possession of said

property, and at the request of the holders of said promissory note he shall sell said property at public auction, at the court-house door in said county, to the highest bidder, for cash, first giving notice of time, terms, and place of sale by advertisement in some newspaper for ten days, and on sale the said trustee shall receive the purchase money, and shall make title to said property to the purchaser, conveying our title thereto as it now exists, and from the proceeds of sale the said trustee shall first pay expenses of sale and advertisement, and retain 2½ per cent. commission on the amount of sale for his services, and shall then pay the amount of principal and interest due on said promissory
98 note, and the balance, if any, he shall pay to us, our heirs or assigns.

And in case the trustee herein named shall be deceased, absent, unable, or unwilling to act when called on to make said sale, the holder of said promissory note due and unpaid may appoint a trustee, and all the powers hereby vested in the said Royall T. Wheeler, trustee, shall vest in the so-appointed trustee.

Witness our hands and scrolls for seals this 18th day of October, 1872.

ANTON MOLZBERGER. [SEAL.]
MERI MOLZBERGER. [SEAL.]

THE STATE OF TEXAS,
County of Galveston:

Before me, Hugo Brosig, a notary public in and for said county and State, at Galveston, in said county, on this 18th day of October, 1872, personally came Anton Molsberger & his wife Meri Molsberger, to me known, and acknowledged that they had executed and delivered the foregoing deed of trust as their act for the purposes and considerations therein expressed. And the said Meri Molsberger on private examination separate and apart from her said husband, after I had fully explained to her its nature and character, she acknowledged the said deed of trust to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she do't not wish to retract it.

99 Given under my hand and notarial seal this 18th day of October, 1872.

[SEAL.] HUGO BROSIG,
Notary Public, G. C.

THE STATE OF TEXAS,
County of Galveston:

The foregoing annexed deed of trust was filed for record in this office, October 21st, A. D. 1872, at 4 o'clock p. m., and recorded Oct. 23, A. D 1872, at 10.30 o'clock a. m., in book 7, pages 542–'3.

In witness whereof, I, Johnson Reed, clerk of the district court of Galveston County, hereto subscribe my name and affix the seal of said court, this 25th day of October, A. D. 1872.

[SEAL.] JOHNSON REED, *Clerk*,
By E. S. FLETCHER, *Dep'ty Clerk.*

GALVESTON, *May 5th, A. D.* 1874.

For value received I hereby transfer, sell and set over the within deed of trust to David M. Hollingsworth, with all the rights and appurtenances thereunto belonging.

(Signed) WILLIAM WERNER.

I decline to execute the within trust.

R. S. WHEELER.

MAY 5TH, A. D. 1874.

The foregoing indorsed as follows: Filed for record Oct. 21st,
100 1872, at 4 o'clock. Johnson Reed, Clerk D. C., G. C., by E. S. Fletcher, dep'ty clerk.
$1.75.

Statement of facts cont'd. Def't reads pl'ff's deed to him & copy of judgment.

Defendant also read in evidence, without objection, sheriff's deed conveying to him the property in question; also, without objection, copy of judgment in favor of R. Marsh Denman & D. M. Hollingsworth vs. Antoine Malsberger, marked D.

Statement of facts cont'd.—Exhibit D.

EXHIBIT D.

R. MARSH DENMAN & D. M. HOLLINGSWORTH, PLAINTIFFS, *vs.* ANTONE MOLSBERGER, DEFENDANT. } No. 236.

APRIL 9, 1869.

On this day came the parties, by their attorneys, and, waiving a trial by jury, submit this cause to the court upon the pleadings and proofs, and the court having considered the same, and being now sufficiently advised, it is ordered and adjudged that the said plaintiff do have and recover, of and from the said defendant, the sum of one hundred and eighty-seven dollars and seventy-six cents ($187.76), being the amount of the note sued on and interest, after deducting the credits proved, together with their costs by them sustained in the prosecution of this suit.

STATE OF TEXAS,
County of Galveston:

101 I, David Wakelee, clerk of the district court, and custodian of the records of the county court of Galveston County, State of Texas, do hereby certify the foregoing to be a true copy of the judgment rendered by the county court of said county in the above-numbered and entitled cause, as the same appears of recordupon the minutes of said county court.

Witness my official signature and the seal of the said district court, this 16th day of April, A. D. 1875.

[SEAL.] DAVID WAKELEE,
Clerk D. C., G. C.

And also read, without objection, original execution from county court, Galveston County, on said judgment, marked F.

Statement of facts cont'd.—Exhibit E.

EXHIBIT E.

County court.

THE STATE OF TEXAS,
County of Galveston:

The State of Texas to the sheriff or any constable of Galveston County, greeting:

Whereas R. Marsh Denman and D. M. Hollingsworth, on the 9th day of April, A. D. one thousand eight hundred and sixty-nine, at our county court in and for said county of Galveston, recovered a judgment against Antoine Molsberger for the sum of one hundred and
102 eighty-seven dollars and eighty-six cents ($187.86), with interest thereon, to be computed at the rate of eight per cent. per annum from the ninth day of April, A. D. 1869, until paid, and twenty dollars and twenty cents for costs ($20.20) and which to the said R. Marsh Denman & D. M. Hollingsworth are now adjudged. These are therefore to command you, that of the goods and chattels, lands and tenements of the said Antone Molsberger, you cause to be made the full amount of said judgment, interests, and costs; together with all further legal fees and charges that may accrue by virtue of this writ. Herein fail not; and due return make of this writ, certifying how you have executed the same.

Witness, Oscar Farish, clerk of the court in and for said county of Galveston, with the seal thereof, this fifteenth day of April, A. D. 1869.

Attest:

[SEAL.]

OSCAR FARISH,
Clerk County Court, G. C.
By JNO. S. JONES, *Deputy.*

Received this writ April 15th, 1869, and return the same May 31st, 1869, not satisfied; no property found.

FRANK DIRKS,
Sheriff, G. C.

Sheriff's fee returning, 75 cts.

THE STATE OF TEXAS,
County of Galveston:

103 I, David Wakelee, clerk of the district court in and for the county of Galveston, do hereby certify the foregoing and within to be a true and correct copy of the execution and sheriff's return thereon in case No. 236, entitled R. Marsh Denman & Co. vs. Antone Malsberger, as the same appears on file in my office.

Witness my official signature and the seal of the said district court this 16th day of April, A. D. 1875.

[SEAL.]

DAVID WAKELEE,
Clerk D. C., G. C.

Bill of costs.

Clerk's fees:	
Copy petition	$1 50
1 citation	75
Docketing cause	25
Filing 5 papers	75
Entering appearance	60
Entering order	1 00
Subpœna	60
Assessing damages	75
Entering final judgment	1 00
Taxing costs and copy	50
Execution and return	1 50
Final record	3 00
Jury tax	3 00
Judgment	3 00
	$18 20
Sheriff's fees:	
Serving citation	1 50
Jury fee	50
	$20 20
Returning fee	75
	20 95

$18.30 paid by plaintiff, and when collected to be returned to them.

The foregoing indorsed as follows: Issued 15th day of April, 1869. Returnable to June term, 1869. O. Farish, clerk.

And also alias execution on same judgment, marked E.

Statement of facts cont'd.—Exhibit F.

District court.

THE STATE OF TEXAS,
County of Galveston:

The State of Texas to the sheriff or any constable of Galveston County, greeting:

Whereas on the ninth day of April, A. D. one thousand eight hundred and sixty-nine, R. Marsh Denman and D. M. Hollingsworth recovered a judgment in the county court of Galveston County, against Antoine Maltsberger, for the sum of one hundred and eighty-seven dollars and 86 cents ($187.86), with interest to be computed at the rate of eight per cent. per annum from the ninth day of April, A. D. 1869, until paid, besides the sum of twenty-two [45] dollars costs of suit in this behalf incurred, as of record is manifest, and which are now adjudged against the said Antoine Moltsberger:

These are therefore to command you, as has been heretofore
105 commanded, that of the goods and chattels, lands and tenements, of the said Antoine Maltsberger you cause to be made the full amount of said judgment, interest and costs, together with all further legal fees and charges that may accrue by virtue of this writ. Herein

fail not, and due return make of this writ, certifying how you have executed the same.

Witness Johnson Reed, clerk of the district court in and for said county of Galveston, with the seal thereof, this 5th day of August, A. D. 1873.

Attest:

[SEAL.]

JOHNSON REED,
Clerk District Court G. C.,
By E. S. FLETCHER,
Deputy Clerk.

Received August 5th, 1873, and I executed the same on the 15th of Sept., 1873, by levying on all the right, title, and interest of Antoine Malsberger in and to lot No. 10, in block No. 90, and the improvements thereon, in the city and county of Galveston; having first called on the defendant to point out property, and failing and refusing to do so, thereupon the plaintiff in this cause pointed out the above-described property, and on the same day I advertised said property by causing one advertisement thereof to be posted up in three public places in the county of Galveston, one of which was at the door of the court-house, for
106 twenty full days previous to said sale, that I would sell the above-described property on the 1st Tuesday, 7th day in October, 1873; and on the 1st Tuesday, 7th day in October, I sold the above-described premises at public vendue in front of the court-house door in the county of Galveston; and whereas at said sale D. M. Hollingsworth bidding therefor the sum of thirty dollars the same was struck off to him for said amount. This writ is entitled to a credit of seventeen dollars & fifteen cents ($17.15). Clerk's fees, $1.50.

JOE ATKINS,
Sheriff G. C.,
By W. S. SEIFFERT,
Dep'ty.

Sheriff, old fees	$2 65
Clerk's fee	1 50
Levy & return	2 25
Advertizing	1 50
Deed	3 00
Notary fee	75
Commissions	1 20
	$12 85

Bill of costs.

Clerk's fees:

Docketing suit	25
Citation	75
Copy petition	1 50
Filing 5 papers	75
Entering appearance	60
" orders	1 00
1 subpœna, 3 witnesses	60
107 Assessing damages	75
Entering final judgment	1 00
Taxing costs and copy	50

Execution & return, 2	3 00
Final record	3 00
Jury tax	3 00
Judgment	3 00
	$19 70
Sheriff's fees:	
Serving citation	1 50
Levying & returning	75
Taking bond	50
	$22 45

Issued 5th day of August, 1873. Returnable to Nov. term, 1873.
JOHNSON REED, *Clerk*,
By E. S. FLETCHER, *Dep'ty Clerk.*

STATE OF TEXAS,
County of Galveston:

I, David Wakelee, clerk of the district court in and for the county of Galveston, do hereby certify that the foregoing is a true and correct copy of an original execution and the return thereupon now on file in my office.

Witness my official signature and seal of said district court this 16th day of April, 1875.

[SEAL.] DAVID WAKELEE,
Clerk D. C. G. C.

Statement of fact cont'd.—Valuation over $5,000.00.

Premises in question are worth over 5,000 dollars.

STREET & MILLS,
For Pl'f't.
LABATT & NOBLE,
For Defendant.

108 *Bill of exceptions.—1st exception.*

On this state of the pleading and evidence the plaintiff contends:

1st. That the levy of the execution and sheriff's sale thereunder of the premises in suit did not convey to the defendant the title to the same on which he can recover in this suit, but the court rules that at the date of said sheriff's sale, the lot and premises were liable to the execution of defendant against Maltsberger, and that the sheriff's deed of the land and premises conveyed the title to defendant and he had the right to recover under his reconvention claim filed in this suit, to which ruling of the court the plaintiff now here excepts.

Bill of exceptions cont'd.—2d exception.

2nd. The plaintiff contends that under the constitution and statute laws of the State of Texas at the date of said levy and sale, and now in force, the homestead of a family being a city lot or lots not to exceed 5,000 dollars in value, without reference to value of improvements thereon, shall not be subject to execution or forced sale for debts, and that at the time of said levy and sheriff's sale the premises in suit were not liable

to forced sale under said execution for debt, on the ground that
109 said premises at the time of the levy and sale was the homestead of said Antoine Maltsberger and his family, but the court finds and rules that said premises were at the date of said sheriff's sale & conveyance liable to the said execution on the ground that said lot and premises was not the homestead of said Malsberger & family at the time of said execution sale, he and his family having previously abandoned the same as a homestead, to which ruling the plaintiff now here excepts.

3rd. The plaintiff contends, as matter of law, that the special findings is insufficient to show and abandonment by Malsberger & wife of the premises in question as their homestead, but the court rules that the evidence and special finding is sufficient to show such abandonment, to which ruling the complainant now here excepts; and plaintiff prays the court that the above and foregoing be signed and sealed as his bill of exceptions in this cause and made a part of the record, which is now done.

[SEAL.] AMOS MORRILL,
District Judge.

The foregoing indorsed as follows: Filed June 24th, 1876. C. Dart, clerk.

110 *Petition for and allowance of writ of error.—Filed June 24th*, 1876.

U. S. circuit court, eastern district of Texas, at Galveston.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } C. L., 891.

To the hon. the judges of the circuit court of the United States for the fifth circuit and eastern district of Texas:

The petition of Isaac S. Hurt, plaintiff in the suit of Isaac S. Hurt vs. D. M. Hollingsworth, and No. 891 of the common law docket of this honorable court, respectfully shows that in said suit of Isaac S. Hurt vs. D. M. Hollingsworth there is manifest error in the final judgment rendered in said case, to the prejudice of plaintiff.

The plaintiff aforesaid, therefore, prays for a writ of error to the Supreme Court of the United States, on given bond in conformity to law, and that the defendant be cited to answer the same and for general relief.

WM. P. BALLINGER &
ALBERT N. MILLS,
Att'ys for Hurt, Pl'ft in Error.

Writ of error allowed.

A writ of error is allowed in this case as prayed for, returnable to the Supreme Court of the United States the second Monday in October next, 1876, the petitioner giving bond in the sum of one thousand
111 dollars, with security, according to law, within 60 days from June 22nd, 1876.

AMOS MORRILL,
Dist. Judge.

The foregoing indorsed as follows: Filed June 24th, 1876. C. Dart, clerk.

Writ of error to Supreme Court.—Filed June 24th, 1876.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between Isaac S. Hurt, plaintiff, and D. M. Hollingsworth, defendant, wherein final judgment was rendered on the 6th day of June, 1876, in favor of said defendant, D. M. Hollingsworth, and against said Isaac S. Hurt, for the lands and premises claimed by said defendant, Hollingsworth, in his reconvention, to wit: Lot No. 10, in block No. 90, in the city and county of Galveston, State of Texas, together with the improvements thereon, and also $475.00, as damages for the use and
112 occupation of said premises and costs, a manifest error hath happened, to the great damage of the said Isaac S. Hurt, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October (1876) next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 24th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

Allowed by—

113 AMOS MORRILL,
Dist. Judge.

The foregoing indorsed as follows: Filed June 24th, 1876. C. Dart, clerk.

Copy of writ of error deposited for def't in error.—Filed June 24th, 1876.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Isaac S. Hurt, plaintiff, and D. M. Hollingsworth, defendant, wherein final judgment was rendered on the 6th day of June, 1876, in favor of said defendant, D. M. Hollingsworth, and against said Isaac

S. Hurt, for the lands and premises claimed by said def't, Hollingsworth, in his reconvention, to wit: Lot No. 10 in block No. 90, in the city and county of Galveston, State of Texas, together with the improvements thereon, and also $475.00 as damages for the use and occupation of said premises and costs, a manifest error hath happened, to the great
114 damage of the said Isaac S. Hurt, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October (1876) next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 24th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

C. DART,
Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

Allowed by—

AMOS MORRILL,
Dist. Judge.

115 I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, do hereby certify the foregoing to be a true and correct copy of the original writ of error issued in said cause, as the same now appears on file in my office.

To certify which, witness my hand and seal of said court, at Galveston, June 24th, 1876.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court E. D. T., G.

The foregoing indorsed as follows: Copy writ of error to Supreme Court. Original endorsed: Filed June 24th, 1876. C. Dart, clerk.

This copy filed and deposited in the clerk's office for the defendant in error, June 24th, '76.

C. DART, *Clerk.*

Filed June 24th, 1876.

C. DART, *Clerk.*

Bond for writ of error.—Filed June 24th, 1876.

Know all men by these presents, that we, Isaac S. Hurt as principal, and T. J. Heard and Alfred Muckle as sureties, are held and
116 firmly bound unto D. M. Hollingsworth in the full and just sum of one thousand dollars, to be paid to the said D. M. Hollingsworth, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 24th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at a regular term of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, to wit, on the 6th day of June, 1876, in a suit depending in said court between Isaac S. Hurt, plaintiff, and D. M. Hollingsworth, defendant, final judgment in favor of the said D. M. Hollingsworth, defendant, was rendered against the said Isaac S. Hurt, plaintiff, for the lands and premises claimed by said defendant Hollingsworth in his reconvention, to wit, lot No. (10) ten in block No. ninety (90) in the city & county of Galveston, State of Texas, together with the improvements thereon, and $475.00 as damages for the use and occupation of said premises, & costs, and the said Isaac S. Hurt, plaintiff, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to
117 reverse the judgment in the aforesaid suit, and a citation directed to the said D. M. Hollingsworth, defendant, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Isaac S. Hurt, plaintiff, shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

I. S. HURT. [L. S.]
T. J. HEARD. [L. S.]
ALFRED MUCKLE. [L. S.]

Sealed and delivered in presence of—
E. M. RUCKER.

Approved by—

AMOS MORRILL,
Dist. Judge.

The foregoing indorsed as fo''ows: Filed June 24th, 1876. C. Dart, clerk.

Bond for appeal.—Filed June 24th, 1876.

Know all men by these presents, that we, Isaac S. Hurt as principal, and T. J. Hurd and Alfred Muckle as sureties, are held and firmly
118 bound unto D. M. Hollingsworth in the full and just sum of one thousand dollars, to be paid to the said D. M. Hollingsworth, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 24th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at a regular term of the circuit court of the United States for the eastern district of Texas, holding sessions at Galveston, to wit, on the 6th day of June, 1876, in a suit depending in said court between Isaac S. Hurt, plaintiff, and D. M. Hollingsworth, defendant, final judgment in favor of the said D. M. Hollingsworth, defendant, was rendered against the said Isaac S. Hurt, plaintiff, for the lands and premised claimed by said defendant Hollingsworth in his reconvention, to wit, lot No. ten (10) in block No. ninety (90) in the city and county of Galveston, State of Texas, together with the improvements thereon, and $475.00 as damages for the use and occupation of said premises, & costs, and the said Isaac S. Hurt, plaintiff, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to
119 reverse the judgment in the aforesaid suit, and a citation directed

to the said D. M. Hollingsworth, defendant, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such, that if the said Isaac S. Hurt, plaintiff, shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, the *the* above obligation to be void; else to remain in full force and virtue.

I. S. HURT. [L. S.]
T. J. HEARD. [L. S.]
ALFRED MUCKLE. [L. S.]

Sealed and delivered in presence of—
E. M. RUCKER.

Approved by—

AMOS MORRILL,
Dist. Judge.

The foregoing indorsed as follows: Filed June 24th, 1876. C. Dart, clerk.

Citation on writ of error.

UNITED STATES OF AMERICA, *ss:*

To D. M. Hollingsworth, greeting:

120 You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, 1876, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Texas, wherein Isaac S. Hurt is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 24th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

AMOS MORRILL,
Dist. Judge.

Received this writ June 27th, 1876, and executed it on the same day by delivering a copy of the within citation to Mr. Noble, one of the attorneys for the defendant.

WM. J. PHILLIPS,
U. S. Marshal,
By E. H. CALLAWAY,
Deputy.

121 On this 27th day of June, in the year of our Lord one thousand eight hundred and seventy-six, personally appeared before me, the subscriber, E. H. Callaway, deputy marshal of the United States for the eastern district of Texas, to me well known, and makes oath that he delivered a true copy of the within citation to Sam'l B. Noble, attorney of record for D. M. Hollingsworth, defendant in error, on the 27th day of June, 1876, in the city of Galveston.

WM. J. PHILLIPS,
United States Marshal,
By E. H. CALLAWAY, *Deputy.*

Sworn to and subscribed before me June 27th, 1876, by E. H. Callaway, dep'ty U. S. marshal.

[SEAL.]

C. DART,
Clerk U. S. Circuit Court, E. D. T., G.

The foregoing indorsed as follows: Returned & filed June 27th, 1876. C. Dart, clerk.

Citation on appeal.

UNITED STATES OF AMERICA, *ss:*

To D. M. Hollingsworth, greeting:

Whereas Isaac S. Hurt has lately appealed to the Supreme Court of the United States from a judgment lately rendered in the circuit
122 court of the United States for the eastern district of Texas, holding sessions at Galveston, made in favor of you, the said D. M. Hollingsworth, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, 1876, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Galveston, in the eastern district of Texas, in the fifth circuit, the 24th day of June in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

AMOS MORRILL,
Dist. Judge.

Received this writ June 27th, 1876, and executed it on the same day by delivering a copy of the within citation to Mr. Noble, one of the attorneys for the defendants.

WM. J. PHILLIPS,
U. S. Marshal,
By E. H. CALLAWAY,
Deputy.

On this 27th day of June, in the year of our Lord one thousand eight hundred and seventy-six, personally appeared before me, the subscriber, E. H. Callaway, deputy marshal of the United States for the eastern district of Texas, to me well known, and makes oath that he delivered a true copy of the within citation to Sam'l B. Noble, attorney of
123 record for D. M. Hollingsworth, defendant in error, on the 27th day of June, 1876, in the city of Galveston.

WM. J. PHILLIPS,
U. S. Marshal,
By E. H. CALLAWAY,
Deputy.

Sworn to and subscribed before me by E. H. Callaway, deputy U. S. marshal, June 27th, 1876.

[SEAL.]

C. DART,
U. S. Circuit Court E. D. T., G.

The foregoing indorsed as follows: Returned & filed June 27th, 1876. C. Dart, clerk.

UNITED STATES OF AMERICA,
Eastern District of Texas:

I, C. Dart, clerk of the circuit court of the United States for the

eastern district of Texas, at Galveston, do hereby certify the foregoing one hundred and twenty-two pages and sixteen lines of writing to contain a true copy of the record, and of all proceedings in the cause, in case No. 891, lately pending in said court, entitled Isaac S. Hurt v. D. M. Hollingsworth, as the same now appears of record in my office.

To certify which, witness my hand and seal of said court, at Galveston, this 17th day of July, A. D. 1876.

[SEAL.]

C. DART,
Clerk U. S. Circ't Court E. D. T., G.

(Indorsement on cover:) No. 269. Isaac S. Hurt, plaintiff in error, vs. D. M. Hollingsworth. E. Texas C. C. U. S. Filed 16th October, 1876.

In Supreme Court of the United States.

OCTOBER TERM. 1879.

No. 49.

ISAAC S. HURT

vs.

D. M. HOLLINGSWORTH.

Brief of P. PHILLIPS,
and W. HALLETT PHILLIPS,
for Plaintiff in Error. ~~X~~ Appellant

October 2, 1879.

R. O. Polkinhorn, Printer.

In Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 49.

ISAAC S. HURT

vs.

D. M. HOLLINGSWORTH.

Brief of P. PHILLIPS, and W. HALLETT PHILLIPS, for plaintiff in error. & appellant

Hurt filed his petition in the District Court for Galveston, claiming to have purchased in June, 1874, a certain lot of ground, in the city of Galveston, from Anton Molsberger, and Mary his wife; the said lot having been acquired by them, on 19 December, 1865, from which time until the sale to petitioner, the said premises continuously was owned and possessed by said Molsberger as his homestead under the law of the State.

The petition then avers, that in April, 1869, a judgment was recovered in the County Court of Galveston, by Marsh, Denman & Co., against said Molsberger, on a debt contracted subsequent to 10 November, 1866, in the ordinary course of business; that afterwards, and while the said premises constituted the homestead of Molsberger, and for the purpose of harassing him, the said premises were sold under said judgment on 9 October, 1873, and was purchased by Hollingsworth a member of said firm, for the sum of $30, credited on the judgment; that the said Hollingsworth received the sheriff's deed therefor, and has duly recorded it.

The prayer runs thus—

"And the plaintiff says, the said recorded deed is a cloud upon his title to said property; wherefore he prays citation to the defendant by publication; that petitioners title to said premises be quieted, and the cloud upon his title caused by the said recorded deed removed; and for damages, costs, and general relief."

Hollingsworth appeared, and on his application as a citizen of Louisiana, the cause was removed into the Circuit Court of the U. S., for the Eastern District of Texas, in March, 1875, and placed on the Law Docket, p .5.

Subsequent to the removal, he filed his answer, admitting the purchase of the premises by Molsberger, in 1869, but denying that the premises constituted a homestead when the sale was made by the sheriff to him in 1873.

The answer then avers, that Hurt wrongfully withholds the possession of said premises, the rent of which of the value of $75 per month.

Wherefore defendant prays that the title to said premises be declared to be in the defendant, and that he have judgment "for the restitution thereof, and for the value of the rents and profits at $75 per month, from the 13 October, 1873, and for costs and general relief."

By leave of court an amended answer was filed, averring that the value of the property was $3,500, and the value of the rents $2,000, making the total value $5,500.

There was also an amended complaint filed, in which it is averred that when the purchase was made from Molsberger and wife, they were the absolute owners in the actual possession and enjoyment of the premises as their homestead, and that it was so possessed at the time the levy was made. The premises are claimed to be of the value of $5,500, and the amendment concludes with the reiteration of the prayer, "that the sheriff's deed be delivered up and cancelled, and that the record thereof in the public records is a cloud on the title, and seriously embarrasses the same.'

On 17 February, 1876, an agreement of counsel was filed, by which they "waive a jury trial in the cause, and submit the matter therein, as well of facts as of law, to the court."

On the same day the court entered a judgment, that "the plaintiff take nothing by his suit, and "the defendant having set up in his answer the ownership of the property, and having prayed a restitution and claimed by reconvention rent for the use and occupation, it is ordered that the defendant, Hollingsworth, have and recover the title and possession of said property, and also the sum of $420 as damages for the use and occupation, and that a writ of possession issue." 10.

At this stage of the proceedings the counsel of the petitioner was changed by the substitution of Messrs. Ballinger & Mills, who, on 15 March, 1876, filed their application to set aside the judgment and rehear the cause, on the various grounds set forth in the motion at page 11; among which is the following:

The judgment was rendered at a special term, when the court had no jurisdiction.

The suit of the plaintiff was a suit in equity, and on the removal into the court should be so tried.

Upon this, the court, on same day, (16 March, 1876,) "ordered that the said judgment and every thing done at the special term of the court, relative to said cause, be set aside and the cause contined on the docket to be proceeded in at the next term of the court in the same manner as if nothing therein had been done at the special term of the court. p. 14.

On 23 March, 1876, Ballinger & Mills filed their motion to have the cause transferred from the law docket, on which it had been improvidently placed, to the chancery docket to be there proceeded in according to the rules and practice of the Circuit Court sitting in chancery.

On same day was filed another motion to take from the files so much of the defendant's answer as purports to be a "cross suit, reconvention suit or cross bill," because the court, setting as a law court, had no jurisdiction to grant the relief prayed for.

And considering it as filed in an equity proceeding as a cross bill, it is a nullity.

Because filed without leave of the court makes no defendant, prays for no process, and no process was ever issued. 14, 15.

These motions were accompanied by a petition for leave to file an amended bill.

On the 3 April, 1876, the District judge, at rules, entered an order (reciting these motions and petitions); "that considering the said case is on the law docket of this court and has been submitted to the court for its judgment, and that there is no jurisdiction to hear such motions at rules, because the said cause is on the law docket, and there is no such cause on the equity docket, the court refuses to entertain them." p. 20.

On 2 May, 1876, an additional motion was filed to have the cause remanded to the State court, because not removed in conformity with law, and because no bond with surety was filed, as required by law. p. 21.

The same matters were presented to Mr. Justice BRADLEY, who, on 6 June, thus disposed of them:

"The plaintiff is too late to move a dismissal. If the bond be not in all respects such as the act of 3 March, 1875, requires, the formality was waived by assenting to proceed without objection, and we are more willing to apply the rule of waiver by reason of the fact that the law was passed only a few days before the removal, and probably had not been brought to the attention of either party.

"As to the objection that the case is intrinsically an equity case and not cognizable in a court of law, by rea-

son whereof the plaintiff now asks for a re-trial and repleader, it is pertinent to observe that this court is a court both of law and equity, and has cognizance of both kinds of cases. Though it be true, therefore, that this cause is an equity cause, this court has cognizance of it, and the question simply becomes one of regularity of pleadings and proceedings. The parties have waived all matters of mere form by going to final hearing, on the merits, and submitting the case to the court.

"The question then is, Have the substantial rights of the parties been violated by the mode and form of proceeding which they have mutually pursued? The petition is certainly sufficient in substance to stand as a bill in chancery. In was such, in effect, in the State court, and the plaintiff did not see fit to alter it here. The answer and reconvention are substantially equivalent to an answer and cross-bill, and ask no more than could have been demanded by a cross-bill. On these pleadings, and on evidence offered to the court, the cause has been heard and is now under advisement. We think that any irregularity in the form of proceeding has been waived, and that we ought not now to rehear and retry the cause or to grant a repleader. If the parties desire it, the substance of the oral evidence, which was adduced before the court, can be placed on the record."

Upon the determination of Judge Bradley, the District Judge, on June 6th, entered the same judgment heretofore cited as rendered on 13 March, 1876.

The case then, in brief, is this: A petition to remove a cloud from the title of petitioner by agreement of counsel, is submitted and tried on the law side of the court. Before judgment is rendered, the error is discovered, and the court is moved to have the cause transferred to the equity side, that it may be proceeded in, as a chancery cause, under rules prescribed for such cases.

In denying the motion it is said, that, though it be true that this cause is an equity cause, the question refers only to regularity of proceedings and pleadings, which, by going to hearing on the merit, and submitting the cause to the court without the intervention of the jury, is a waiver of all matters of form.

We insist that the question made to have the cause decided by the principles of equity, and the rules established for the exercise of the equity jurisdiction is a substantial one, and not a matter of mere form.

No State practice in Texas, in whose court the case originated, can be imported with its transfer into the Circuit Court of the United States, so as to blend the jurisdiction of common law and equity causes.

In *Bennett* vs. *Butterworth*, it was argued that the petition being in the nature of a bill in equity, for the specific delivery of slaves, and the jury having found substantially the right of property to be in the plaintiff, all errors of form should be disregarded.

The case had been tried by a jury, and the only question raised, was as to the regularity of the judgment.

TANEY, Chief Justice, in delivering the opinion, said, that though the proceeding and practice in the State Court of Texas have been adopted in the District court, it must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The constitution establishes the distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But, if the claim is an equitable one, he must proceed *according to rules which this court has prescribed under authority of the act* 23 *August*, 1842, *regulating proceedings in equity in the courts of the United States.* 11 How., 674.

In *Dunphy* vs. *Kleinsmith*, a creditor's bill was filed in the Territorial court, of Montana. The cause was put at issue by an answer, and the issues of fact were tried by a jury under the provisions of the Territorial acts. A verdict was rendered and accepted by the court. Thereupon the court entered a decree, reciting the findings of the jury. The question presented here was whether these proceedings, conducted in the manner stated, could be sustained.

The opinion of the court, delivered by BRADLEY, Justice, holds that the case was strictly a bill in chancery, praying for equitable relief, and that it was obvious that the trial was conducted as a trial at common law, and that the decree was rendered on the verdict precisely as a judgment is rendered on a verdict at common law.

This (says he) was clearly an error. The case being a chancery case, should have been tried as a chancery case, by the modes of proceeding known to Courts of Equity. In these courts the chancellor is responsible for the decree. If he refers any question of fact to the jury, he is still to be satisfied in his own conscience that the finding is correct, and the decree must be made as the result of his own judgment. Here the judgment was pronounced as the mere conclusion of law upon the facts found by the jury. The decree was accordingly reversed.

11 Wall., 614.

No importance was attached in this decision to the fact that the parties had assented to a trial by the jury, and that the defendant had thus waived the right to object.

The case in hand differs from the above in this alone. Here there was no trial by jury. The parties having waived such a trial, and agreeing that the judge should be substituted for a jury, in the finding of the facts, as in a common law case. Had the judgment in this case been entered upon a verdict, the two cases would have been identical in principle. The difference between the two is

immaterial. The judge, on the submission, proceeded as in a common law case, and the proceedings were not conducted "*according to the rules which the court has prescribed, under the authority of the acts of Congress regulating proceedings in equity, in the courts of the United States.*"

In *Hornbuckle* vs. *Toombs*, October term, 1873, Mr. Justice BRADLEY, speaking for the majority, expresses dissatisfaction with the decision in *Dunphy* vs. *Kleinsmith*, but only on the point that, *Territorial Courts* were not subject to the same regulations in equity cases, which govern the practice in the Circuit and District Courts.

As to the latter courts, the decision maintains the correctness of the numerous adjudications of this court enforcing the process act of 1792, which provides that in suits in equity the forms and modes of proceeding should be according to the "principles, rules, and usages" which "belong to courts of equity as contradistinguished from courts of common law," subject "to such regulations as the Supreme Court should think proper to prescribe." And in citing this act, Judge BRADLEY adds:

"The Supreme Court in prescribing rules of proceedings for those courts has always followed the general principle indicated by the law."

18 Wall., 652.

The motion made in this case raised a jurisdictional question. Consent cannot confer jurisdiction; the party consenting is not estopped from raising it at any time, and this court will take notice of it *sua sponte*.

Thompson vs. *Railroad Co.*, 6 Wall., 136;
Oelrichs vs. *Spain*, 15 Wall., 228.

Assume, however, that the learned Justice was right, and that the answer of defendant could be regarded as a cross-bill, still the judgment of the District judge, which grants the relief prayed for, cannot be maintained upon any principle of equity pleading.

The plaintiff merely prayed for the removal of the cloud upon the title of property, of which he was in possession, created by the recorded deed of the defendant.

On the other hand, the defendant, in his answer, called upon the court to decree that the title was in him, and that he have a judgment putting him in possession of the premises, as also for the rents and profits. Judgment was rendered in conformity to his prayer.

As a mere answer it could not be the foundation of affirmative relief.

And, if regarded as a cross-bill, though not purporting to be such, or filed by leave of the court, the only relief that could be decreed on such a proceeding is equitable relief, such as, in point of jurisdiction, it is competent for the court to give.

So, in *Calverly* vs. *Williams*, the Lord Chancellor said: "As to the cross-bill to be let into possession, I cannot decree that. It is merely a legal title and the object of an action of ejectment; therefore, it must be dismissed with costs."

1 Vesey, Jr., 212.

17 Hows 595
1 Wall. 10. 14
2 Do 289
9 Do 809

Cooper states the foregoing case thus:

"Care must be taken that the relief prayed by the cross-bill is equitable relief; for where a purchaser, under articles of agreement, filed his bill for a conveyance, and the vendor exhibited his cross-bill to recover possession of part of the premises which the other had got into possession of, though the court dismissed the first bill, yet they not only gave no relief upon the cross-bill, but, inasmuch as its end was the proper object of an action of ejectment, they dismissed the cross-bill with costs."

Cooper's plea, p. 86.

Story states the rule in the same terms.

Story's Eq. Plea, § 398.

Again, to obviate the difficulty that the evidence was

not taken according to the equity rules, it is directed by the order of Judge BRADLEY that "if the parties desire it, the substance of the oral evidence, which was adduced before the court, can be placed on the record."

We submit that the whole case has been conducted regardless of the well established principle that in equity cases the Federal courts follow the strict rules of equity practice, as distinguished from those which govern actions at law.

The importance of adhering to these rules is no where more strongly stated than by this court, in the case of *Windsor* vs. *Mc Veigh*, in which it is said that a "departure from established modes of proceeding will often render the judgment void. Thus, a decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that courts are not authorized to exert their power in that way." 93 U. S., 283.

While the learned Justice treated the case as in substance an equity proceeding, the District judge, who rendered the judgment, insisted in regarding it as a case at common law, to be governed by its principles and practice.

The strenuous efforts of counsel to have the cause transferred to the equity docket, to amend the complaint, to strike out the plea on reconvention, were met with the answer, that "the cause was on the law docket, and had been submitted to the court for its judgment."

And so the record presents the case here as a bill to remove a cloud upon real estate docketed on the law side of the court, submitted as a common law case, with waiver of a jury—tried by common law rules, and consummated by a common law judgment.

How to treat such a case puzzled the attorneys in the court below. If it was an equity case appeal was the

remedy, if a common law case writ of error. Finding that they had to deal with a hybrid, they took both appeal and writ of error. And the presentation of the case here, in this double aspect, was the foundation of a motion by the appellee which was denied by the court, saying—"when we come to examine the case we will determine whether it is properly here by appeal or writ of error, and will proceed accordingly." 94 U. S., 111.

The case cannot otherwise be considered here than as appeal in an equity proceeding. It is impossible that a petition or bill for the removal of a cloud upon the title of real estate can be treated as a common-law proceeding in any tribunal where the distinction between equitable and common-law actions prevail.

In *Insurance Co.* vs. *U. S.*, a proceeding to enforce the forfeiture of real estate was conducted by libel and testitimony taken in conformity to the practice in admiralty, and without the intervention of a jury. This court took jurisdiction by *appeal*, but only for the purpose of reversing the decree as irregular, and directing a new trial. It was ordered that "the proceedings on the new trial should be conformed in respect to trial by jury, and exceptions to evidence to the course of proceeding by information on the common-law side of the court in cases of seizure upon land."

6 Wall., 759.

If, however, the court should proceed to examine the evidence as in an equity case, they will find nothing to justify the decree which vests in the defendant, who claims, by virtue of a purchase for $30, title to property which both parties value at over $5,000.

Hollingsworth claims, by sheriff's deed on a sale in 1873, made on a judgment rendered in 1869, for $187.

The property was purchased by Molsberger in 1865.

It is admitted, on the record, that the premises, at the time of the levy and sale by the sheriff, was occupied by Molsberger's tenants. p. 35.

Molsberger testifies that from 1865 the premises constituted his homestead, and were used as such, until sold to the complainant; that, prior to the sale, he had rented out two of the tenements, and at the same time the family occupied the third tenement on the lot; that, about June, 1872, he leased, with the privilege of purchase, a tract about fifteen miles from the city, where he took his family with part of his furniture, but that every few days a part of the family would be in the city and occupy the said tenement and use the stable for their horses; that the property was always claimed by himself and wife as a homestead, and that the sheriff was so told when he asked for a levy. 36.

Mrs. Molsberger fully sustains this evidence, and adds that, prior to her husband's purchase in 1865, she had inherited an estate from her mother, which was sold, and the proceeds appropriated to the purchase of this property and the improvement thereof, and that, to the date of the sale, the family had no other homestead. 37.

How it was that property of this value was sold for $30 is explained by the sheriff, who testifies "that the general understanding at the time of the sheriff's sale was, that the premises in dispute was the homestead of Molsberger and wife." 37.

Hollingsworth, who purchased in October, 1873, made no effort to acquire possession until March, 1875, and then only by way of answer to the proceedings instituted by Hurt. Why this omission if he believed the property was subject to execution?

The judgment or decree of the court in favor of Hollingsworth is rested on the ground that Molsberger and wife had, previous to the sale to Hurt, abandoned the premises as their homestead.

All that the defendant gave in evidence on this point is the testimony of a single witness.

S. W. Sydnor testified that, in 1873, Molsberger wanted to borrow money on the premises. "I told him it was difficult to borrow money on a homestead; and he said that he claimed his homestead down in Galveston Island." 38.

In addition to this, defendant introduced a deed of trust executed by Molsberger and wife on 18 October, 1872, by which the premises were conveyed to R. S. Wheeler, to secure the payment of a note to William Werner for $300.

Wheeler declined to act as trustee; but Werner, on 5 May, 1874, transferred the said deed to Hollingsworth. 39.

It appears, from the evidence of Trueheart, that he leased to Molsberger a tract of land in Galveston Island with the privilege of becoming the purchaser. *After he sold to Hurt* he purchased a part of the tract on the island, and the proceeds of the sale to Hurt were applied to this purchase. The witness further testified that he loaned Molsberger the money to pay off the deed of trust to Wheeler, and thinks that the sheriff's sale was made before the deed of trust was paid off. p. 37.

All that there is in the case to show the intent of abandonment is to be found in the conversation with Suydor, who, recognizing, in common, with others the premises as a homestead, interposed this as a difficulty in borrowing money thereon.

On this question of intent "the sworn statement of the party himself taken in a court of justice, if credible, must settle it, for he alone has full knowledge of that intent, and his statement as to that intent can be directly contradicted by no human testimony. It is true that the testimony of a witness may be discredited to some extent by proof of contrary statements when not under oath; but such proof, by no means, impeaches or disproves his sworn testimony. A person when not under oath and under the influence of

passion or prejudice, or other excited cause, may sometimes indulge in inconsiderate language not strictly true. But it is supposed that the sanctity of an oath will outweigh all exciting causes; and when such testimony is given of the intent and purposes of the mind of the witness, it can be disproved only by clearly establishing the falsity of such testimony.

McMillan vs. *Walker*, 38 Tex., 415.

It is confidently submitted that, giving full weight to the reply made by Molsberger, taken in connection with all the other evidence in the cause, there is no justification for a decree on the ground of abandonment at the time of the sale to Hollingsworth for $30.

Title to valuable property is not to be confiscated or lost by such trivial evidence. The homestead right is one that is cherished and protected by the courts.

In the Supreme Court of Texas, in *Shepherd* vs. *Cassedy*, it is said:

"The homestead is not to be regarded as a species of prison bounds which the owner cannot pass over without pains and penalties. His necessities or circumstances may frequently require him to leave his homestead for a greater or less period of time. He may leave for the subsistence of his family, or he may intend to abandon provided he can sell. But let him leave for whatever purposes he may; be his intentions what they may, provided they are not of total relinquishment, his right to exemption cannot be regarded as forfeited. The right to the homestead cannot be forfeited unless by a continuous abandonment up to the time that some opposing right by sale was vested legally in other parties."

Again:

"If an old homestead can be lost without proof that a new one has been granted, certainly the circumstances to show an abandonment must be most clear and decisive."

And again:

"If the party did intend in leaving to abandon the homestead, this may be changed by him up to the time he acquired a new homestead."

20 Tex., 24.

The doctrine of this case has been steadily adhered to by subsequent decisions of the State courts.

See case of *Cross* vs. *Evarts*, 28 Tex., 524.

Assignment of Errors.

The rulings of Mr. Justice Bradley, at p. 24, denying the motion to have the cause transferred to the equity docket to be there proceeded in agreeably to the rules of practice in the circuit court sitting in chancery.

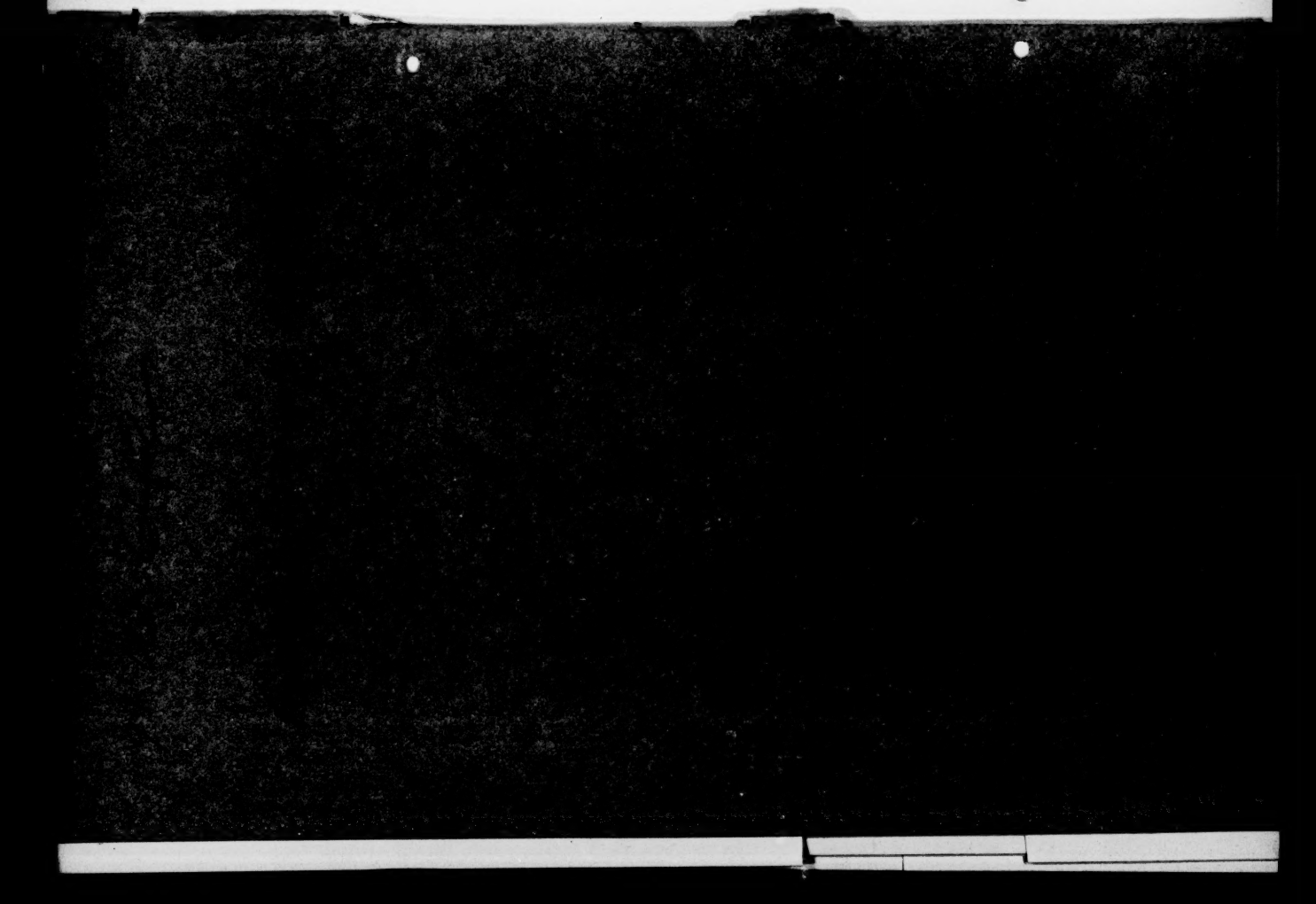
The judgment rendered by the District judge, as in a common law case, vesting title in the defendant and ordering a writ of possession.

Regarding the cause as one in equity, and the proceedings sufficiently regular to justify action by the chancellor, the decree should have been for the appellee.

The cause was not properly removed from the State court, and the motion to remand should have been granted.

P. PHILLIPS,
W. HALLETT PHILLIPS,
for Appellee.

Plaintiff in Error



UNITED STATES SUPREME COURT.

HOLLINGSWORTH.
vs.
HURT.

Supplemental brief on question of homestead.

It is true that the Texas cases do not require, as an *indispensable condition* to the abandonment of the homestead, that another should have been acquired. Yet this is, in general, the test, as without it, say the court, "it must be undeniably clear, beyond almost the shadow, at least of all reasonable ground of dispute, that there has been a total abandonment, with an intention not to return and claim the exemption."

Goubenant vs. *Cockrell*, 20 T., 96;
Young vs. *Van Benthuseyen*, 30 T., 770.

In *Mills* vs. *Van Boskirk*, it was shown that in May, 1865, the husband and wife left their home—stating that they were leaving the country for Mexico, and that they did not know that they would ever return. In 1867 the premises were attached—the parties never returned, but there was no evidence that they had acquired a new homestead elsewhere. The court held there was no abandonment, saying: "Among the old jurists three things—life, liberty and property were held sacred by the law, and we are

disposed to protect the homestead of parties with equal watchfulness." 32 Texas, 362.

The whole current of the Texas decisions shows that continued occupancy—possessio pedis—continued living in the popular sense, is not necessary in order to prevent an abandonment.

In *Franklin* vs. *Coffee*, the court say: "Where a home residence or settlement has been acquired on lands, it is not necessary that there should be continuous, actual occupancy to secure the land from forced sale. 18 T., 416.

The period of absence from the homestead is immaterial, except as it involves the question of its absolute abandonment. *Fullerton* vs. *Doyle*, 18 T., 3.

In *Henderson* vs. *Ford*, the homestead had not been occupied for four years, (46 T., 286).

That a debtor can sell his homestead, and acquire another without subjecting the abandoned home-stead to his general debts, the vendee taking as against a judgment-creditor who, otherwise, would have a lien, there is no doubt. *Black* vs. *Eppmond*, 40 T., 162.

Whittenberg vs. *Loyd*, 49 Texas, 633, (1878) announces clearly the well-understood doctrines in Texas, applicable to this case. W. owned a homestead in Ellis County; he determined to sell this, and remove, and acquired a homestead in Tarrant County; and bargained for its purchase, and removed to and occupied it, prior to his sale of the homestead in Ellis County; but which was relied upon for the acquisition of the new homestead.

The place in Ellis County was sold for another tract of land in Ellis County, and for part money; and an attachment was levied on the said tract of land in Ellis County.

It was not disputed by any party, but is clearly assumed by the court, that the homestead in Ellis County continued exempt from levy and forced sale, and did not become subject thereto by the removal to, occupation and intended

acquisition of, the title to a homestead in Ellis County. But it was further contended, that the tract of land received in Ellis County, in part exchange for the homestead, although never occupied nor intended to be, was also exempt.

Mr. Justice GOULD admits that the question is not free from difficulty, and says, (p. 641):

"It is argued, and not without force, that the spirit and object of the homestead exemption require that the citizens be protected, *not only in exchanging one homestead for another, and in selling for cash, and with the money buying another*, but also in selling on a credit, or for unexempted property, for the purpose of using the proceeds to pay for another homestead; *and certainly it would have been in the power of Whittenburg, who had, before he parted with his old homestead, bargained for another*, to have secured to his vendor so much of the proceeds as was needed to complete the payment for the new homestead, but to the broad claim that the proceeds of the sale or exchange of a homestead shall be exempt, the answer is that neither in the constitution nor in any statute is provision made for such a case; and that if such exemptions be needed it would come in the shape of additional legislation."

This language is used with reference, of course, to the facts of the case, that the contract for the purchase of the homestead in Tarrant County and the actual removal to and occupancy of it, preceded the sale of the homestead.

To maintain that the owner of a Texas homestead, so soon as he determines that the comfort, the interest or the health of his family requires a change, so soon as he ceases, bodily, to inhabit, sleep and eat there—so soon as he commences to arrange to provide for a home elsewhere by preliminary negotiation and occupancy; but before he has acquired any title or right thereto, the law steps in and forfeits and deprives him of his homestead, would be most repugnant to every utterance by the courts of that State, and to a most cherished public policy.

To speak of the place "down the island," in the sense of the law, as the homestead of Molsberger and family, prior to their sale of the homestead in town, is a misnomer—an abuse of ideas.

Molsberger says he had leased it with privilege of purchase. (page 36).

Mr. Trueheart says, as agent of W. R. Smith, he rented land down Galveston Island to Molsberger; witness authorized Molsberger to go on the tract he rented, with the privilege of purchasing * * *

After Molsberger and wife sold the premises in suit to Hurt, he bought a part of that Smith tract from me as agent; the proceeds of the sale to Hurt were applied to the purchase of the Smith tract; the whole matter passed through my hands. (page 37).

As to this, there is not the slightest dispute—no scintilla of evidence against it.

In *Smith* vs. *Chenault*, 48 Texas, 455, (a very late case decided in 1878), C. I. Moore says:

"*Certainly a man cannot acquire a homestead-right to land that he does not own.*" (page 462).

The legal title to land is not necessary to constitute it a homestead, in Texas; but the text, as shown in this case, is, that, if an equitable title, it must be such that the occupant could enforce the conveyance of title, by suit, for specific performance. (page 461).

That Molsberger had title, legal or equitable, to any right, to be enforced by specific performance, to the lots of Dr. Smith, down on Galveston Island, prior to his purchase of them after sale of his homestead in town, cannot be pretended.

Sydnor's testimony is, that Molsberger, in trying to borrow money from him, when he said: "It was extremely difficult to borrow money on a homestead," replied, "I claim my homestead down Galveston Island."

Instead of recognizing, as the judge in this case did, that his homestead was down the island, the true answer was that this was an impossibility—in the very nature of things it could not be true.

As to the declaration of Molsberger, that he claimed his domicile on Galveston Island, in addition to what has been already submitted, we say the homestead is a right reserved to the family, and such right cannot be affected by the declaration of one of the parties. The husband could not have conveyed the premises without joining the wife. He, therefore, cannot affect her rights by any other action on his part.

Young vs. *Benthuseyen*, 30 T., 770;

Thomas vs. *Williams*, 50 T., 275.

It is asserted that the giving of the deed of trust showed a purpose to abandon.

By the laws of Texas a deed of trust may be given on the homestead.

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But in the case of the death of the husband the court could not enforce sale. The wife's equity is superior.

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The court will find the provisions of the Texas law on he subject of homesteads 1 Pasch. Dig. Laws, 662.

P. PHILLIPS,
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In the Supreme Court of the United States.

OCTOBER TERM, 1879.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 49.

BRIEF OF JAMES LOWNDES FOR APPELLEE.

Statement of Facts.

On the 19th December, 1865, Molsberger became, by purchase for $1,500, the owner of a lot in the city of Galveston, known as Lot No. 10 of Block 90, on the map of the Galveston City Company, (Trans., 35). He and his family occupied it as a homestead until May or June, 1872, when he leased, with the privilege of purchase, a tract of land, fifteen miles from Galveston, to which he removed his family and furniture (Trans., 36), and on which he built a house. Trans., 37, fol. 34. Lot No. 10 was on or up to the 15th of September, 1873, occupied by tenants of Mohlsberger. Trans., 35.

On the 9th April, 1869, the firm of Denman & Hollingsworth recovered judgment against Mohlsberger in the county court of Galveston county. Trans., 40.

On the 18th October, 1872, Mohlsberger and wife conveyed Lot No. 10 to Wheeler, in trust, to secure a note of $300 due to Werner. On the 5th of May, 1874, Werner assigned his interest under the deed to the appellees. Trans., 38, 39. This deed was unpaid on the 15th day of September, 1873. Trans., fol. 95.

On the 15th of September, 1873, Lot No. 10 was levied

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

ISAAC S. HURT
vs.
D. M. HOLLINGSWORTH. } No. 49.

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on under the judgment of the 9th of April, 1869 (Trans., 43), and was sold and conveyed to appellees by the sheriff on the 13th of October, 1873. Trans., p. 34 The deed was duly recorded. Ibid.

On the 8th of June, 1874, Mohlsberger and wife conveyed lot No. 10 to the appellant for $2,625. Trans., p. 32.

After June, 1872, Mohlsberger and his family lived on the Smith tract, fifteen miles from Galveston, built a house there and cultivated the land. Trans., fol. 92, 93, 94. Lot No. 10 was for sale during this time. Trans., fol., 94. Mohlsberger, in 1873, wished to raise money on it. Trans., p. 38, fol. 95. In 1873, he declared that his homestead was on the Smith tract. Ibid. He was seldom seen in Galveston. Trans., fol. 94.

There is no evidence that Mohlsberger, at the time of the sale to the appellee, made any claim of homestead in Lot No. 10.

There is no evidence that the appellee, at the time of the sale to him, had notice in any way that said Lot No. 10 was a homestead.

The court below found, as a matter of fact, that Lot No. 10 had been abandoned as a homestead. Trans., p. 45, fol. 109.

The appellant who claims under the deed of June 8, 1874, contends that the sheriff's deed of the 13th of October, 1873, to the appellee, is inoperative because Lot No. 10 was a homestead. The appellee contends that Lot No. 10 had ceased at the time to be a homestead by reason of abandonment.

The decree was for the appellee on all points.

Argument.

The issue in this case is whether or not the lot in Galveston was or is a "homestead," within the meaning of the constitution of Texas. This is a mixed question of law and fact, and the appellee contends:

I. That, as matter of law, the character of homestead depends upon actual occupancy and is lost by abandonment.

II. That, as matter of fact, the lot in dispute had been abandoned as a homestead by Mohlsberger and wife at the date of sale to such appellant, on October 13, 1873.

III. That he had no notice of the homestead rights of Mohlsberger and wife.

IV. The land is not protected against the judgment under the constitution of 1866, because it does not appear that the debt was contracted after that date, nor under the constitution of 1845, because it is land in a city.

I. The character of homestead clearly depends upon actual occupancy.

Neither the constitution of Texas nor its statutes defined the "homestead right," and the precise nature of the right is to be derived from the decisions. The decisions are all collected in Thompson on Homesteads, secs. 241, 255, 257, 258. The result of them is there stated as follows:

"There must be an actual personal occupation; occupation through a tenant is not sufficient; it must be occupied by the family as a home."

It is well settled that the character of "Homestead" is lost by abandonment.

Thompson, secs. 262 et seq.

The courts of Texas have laid down the same rule in a late case:

"The leading proposition of the charge is that a new homestead must be acquired before the old one can be lost by abandonment when, as has been shown, voluntary abandonment with a fixed intention not to return, though

a new homestead may not be acquired, will open the property to creditors."

Woolfolk *vs.* Ricketts, 41 Texas, 363.

"The evident object and purpose of this constitutional provision, as well as the inherent nature, and essential requisites of a homestead for a family, and the obvious facts and circumstances manifest in the dedication of property to this purpose, were evidently supposed to be such as would plainly indicate the existing as well as the particular extent and locality of the homestead to all persons interested in having cognizance of it. While the provisions of the constitution in regard to the homesteads were designed for the protection and security of families, they certainly were not intended to enable either the cunning or reckless and indifferent to entrap to their injury those using due diligence in dealing with the head of the family, or to put it into the power of such persons to make innocent parties pay the penalty of their fraud and ignorance."

And unquestionably as a general rule—

"A man's homestead must be his place of residence—the place where he lives. 22 Tex., 502. The place of the house. 44 Tex., 610. When the family have distinctly and unequivocally removed from one house or 'mansion house' and its adjoining land, and taken up their permanent abode and place of residence in another house upon a different place, and where there is nothing connected with such removal and residence, indicating that it is not intended to be permanent, certainly the presumption arises, if indeed, the absolute conclusion is not warranted in support of the title of one who has purchased it in good faith from the husband, that the place from which the family have gone is abandoned as their homestead."

Woolfolk *vs.* Ricketts, Tex. Rep., vol. 48, p. 36 and 37.

This court thus states the law of Illinois:

"In order to reach a proper conclusion in this case, it is necessary to understand what is the nature of the homestead right. It cannot in an absolute sense be said to be

an estate in the land; the law creates none and leaves the fee as it was before, but in substance declares that the right of occupancy shall not be disturbed while the homestead charter exists. While this continues, the judgment creditor cannot lay his hands on the property, nor the husband sell it without the consent of his wife, and not then without an express release on the part of both of the benefits of the law. The purpose of the legislature was to secure a homestead for the family, and the disposition of the property either by judicial sale or voluntary conveyance, was left unaffected except so far as was necessary to accomplish this object. As long as the property retained its peculiar character, it was within the protection of the law, but the exemption from sale under execution or by deed (except with homestead waiver), could be lost by abondment or surrender; that is to say, by acts *in pais*."

Black *vs.* Curran, 14 Wall., p. 469.

II. The lot in Galveston had in fact been abandoned by by Molsberger and his family as a homestead, at the time of the sale to the appellee.

1. Molsberger and his family had more than a year before removed to the Smith tract, fifteen miles from Galveston. Their furniture had been removed there.

2. He had built a house there. He was inhabiting the house, and cultivating the land at the time of sale. He was seldom seen in Galveston.

3. He expressly disclaimed the right of homestead in lot No. 10, and expressly claimed it in the Smith tract.

4. He made no claim of homestead at the time of the sale.

5. On the 18th October, 1872, he and his wife conveyed the legal title to Wheeler to secure a debt.

This mortgage is a circumstance indicating very strongly a purpose to abandon. Where a man and his wife (who

could jointly make a title to the homestead), put it in the hands of a creditor, they say to the world, that they have ceased to value it as a home, and intend to treat it only as property. This implication is the stronger, where, as in this case, they had established their home elsewhere.

6. The conveyance to the appellant June, 1874, was a complete abandonment.

Allen *vs.* Cook, 26 Barbour, 374.
State Bank *vs.* Carson, 4 Neb., 498.
Norris *vs.* Kidd, 28 Ark., 492.
Curran *vs.* Black, 14 Wall., 469.

7. The court below has found the fact of abandonment, and this court will not disturb the finding of the lower court except in very clear cases.

The burthen of showing that land was subject to the right of homestead is on him who sets up the right.

Grosholz *vs.* Newman, 21 Wall., 486.

III. The appellee had no notice that Lot No. 10 was homestead.

"A secret intention of the seller, not made known, cannot affect a purchaser, unless the purchaser knew or, from the circumstances, ought to have known, that the lots were a part of the homestead, he had the right to treat with and purchase from the husband without the concurrence of the wife."

Grosholz *vs.* Newman, 21 Wall., 487.

This is not a case between the homesteader and his creditor, but between a homesteader and a purchaser for value without notice.

The question does not arise here whether or not the judgment was a lien during the existence of the homestead right or only could become one on a levy, for there was a levy (Trans., p. 43, fol. 105) before the sale to appellant.

The only circumstance which can be suggested as against these views is that Molsberger and wife had not acquired a new homestead. But in *Woolfolk vs. Ricketts, just cited above, the court expressly held that there might be abandonment before acquisition of a new homestead.*

This case is stronger than that. There it was expressly shown that no new homestead had been acquired. The building by Molsberger of a house on the Smith tract is evidence of the acquisition of a new homestead.

There was no evidence in that case of abandonment but the fact of non-occupancy. In this case, that fact is reinforced by material facts showing the purpose to abandon.

The case is stronger than that of Black *vs.* Curran. There the sale was made while the homestead was occupied; in this case it was made after abandonment.

The appellant can succeed only by showing as matter of law that the homestead right is an estate which is not lost by abandonment. That view converts it into an estate absolutely beyond the reach of creditors.

IV. There is nothing in the record to show that the debt on which the judgment of Denman & Hollingsworth was rendered, was created after 1866, and the case is not brought within the constitution of 1866.

The land being situate in a city is not within the constitution of 1845.

As to question of practice:

Several errors are allege in matters of practice:

1. It is said that the cause should not have been removed from the State court.

To this there are two answers.

No objection was made to the removal by the appellant, and that fact is recited in the order of removal. P. 5.

All right to object to the removal was waived by the appellant. The order for removal was made on the 8th of March, 1875, and the motion to remand was not made until the 2d of May, 1876. In the meantime the appellant had amended his bill (p. 9), had waived trial by jury (p. 10), had tried the case (p. 10), had made several motions (pp. 11, 14, 15), and filed an amended bill (p. 18).

The act of March 3, 1875, could not have been known when the order for removal was made and this fact made it especially incumbent on the plaintiff to assert his rights under it.

The defect in the bond could have been easily cured.

The 5th section of the act (18 S. L., 471) does not make a defect in the bond a ground for remanding.

2. It is said that the cause did not proceed according to the rules of chancery practice.

The only two respects in which the chancery practice has been departed from are putting the case on the law docket and in examining the witnesses orally.

The plaintiff was not at all injured by the putting of his case on the law docket, because the judges of the equity court tried the cause, and tried it as an equity cause.

The plaintiff seems to have consented to the taking of the testimony orally, and was competent to do it.

Blease *vs.* Garlington, 92 U. S., 7.

As said in that case, "the testimony has been taken down or its substance stated in writing and made part of the record," which saves it from the usual objection against oral testimony.

The cases cited by the appellant are cases in which a substantial right had been disregarded, viz., the right of having the chancellor's decision on the facts.

3. It is objected that under the answer, a common law remedy has been granted.

It is conceded that this is a difficult question, but the jurisdiction of the court can be sustained on principle.

The general rule is that, to prevent circuity, a court of equity having obtained jurisdiction on an acknowledged ground of equity, will go on to administer relief of a legal character.

There are many instances of this rule. Where an injunction is asked against a trespass, a court will also grant an account, which is, in effect, giving damages for the tort. Adams' Eq., 207. So where equity is resorted to in the case of lost bonds or negotiable instruments, it orders payment. So in decreeing foreclosures, it decrees payment of any balance due. In assigning dower and adjusting boundaries, it administers rights founded on legal title.

On principle, therefore, the court of equity, having obtained jurisdiction on the ground of removing a cloud upon title, can proceed to give the relief asked.

There are two reasons why such relief is especially proper in this case. 1. Because the relief sought by the plaintiff is upon the legal title and is essentially asking a court of equity to aid in protecting a legal title. 2. Because, in the courts of Texas, such relief, it seems, can be granted under a reconvention.

In Shaw *vs.* Bill (95 U. S., 10), this Court held that no subpoena need issue on a supplemental bill; and this reconvention or cross-bill is within the reasons of that decision. The plaintiff had full knowledge of the reconvention. P. 14.

Where, as in this case, a jury was waived, the difference between the law side and the equity side of the court is one only of name.

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